CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI,

OCTOBER TERM, 1872, AT ST. LOUIS,

[CONTINUED FROM VOL. L.]

W. C. R. WIGGINS, Respondent, *v.* MADISON GRAHAM, Appellant.

1. *Agency — Share of profits, suit for by clerk — Evidence — Books of concern — Rule of damages, same as that of partnership.* — In an action by a clerk against his employer, on an agreement whereby the former was to receive as compensation a certain portion of the net profits of the business, where it appeared that plaintiff kept the books and managed the business, the books would be proper but not conclusive evidence on either side. Defendant might show that plaintiff had introduced false or fraudulent entries into the books of the concern.

The rule for ascertaining damages in such cases is precisely the same as that which applies to partnership accounts.

Appeal from Jefferson Circuit Court.

Greene and *Williams*, for appellant.

J. L. Thomas & Bros., for respondent.

ADAMS, Judge, delivered the opinion of the court.

The defendant was a merchant, and employed the plaintiff as clerk to take charge of and manage his business for one year ending March, 1871, for which he agreed to pay him one-third

of the net profits. This action was brought on this agreement, and the petition alleges that the net profits of the business amounted to $1,998.28, of which the plaintiff claimed one-third as the amount due him under the agreement. The agreement is admitted by the answer, but the defendant denies that there were any net profits. Whether there were any net profits or not was the issue presented by the pleadings and tried in the Circuit Court. The case was submitted to a jury and resulted in a verdict for the plaintiff. On the trial the plaintiff was introduced as a witness, and produced abstracts from the books of the defendant, which books he himself had kept. These abstracts were read to the jury as evidence. The first abstract was a memorandum of the amount of goods on hand, the amount of accounts and debts due to and by defendant, and showing the balance as the stock on hand when the plaintiff entered into his service. The second abstract was the same kind of account taken at the time the plaintiff left the defendant's service at the end of the year, and, deducting the first from the last, left the balance of $1,909.28, which the plaintiff claimed was the net profits; and this was substantially the evidence upon which plaintiff relied for a verdict, and a verdict was found for him on this basis. The defendant, on his part, gave evidence conducing to prove that the plaintiff had, during his employment, the custody of the books from which these abstracts were taken, and made all the entries thereon; and he offered to prove that the plaintiff had made false and fraudulent entries on them so as to show larger profits than really existed. But the court excluded this evidence on the alleged ground that no foundation had been laid in the answer by averments to that effect to warrant its admission, and the defendant excepted. After the evidence was closed, the court, at the instance of the plaintiff, gave this instruction to the jury:

"The court instructs the jury that the rule by which the net profits of any business for a given year are ascertained, is to ascertain the amount of stock, including the goods, wares and merchandise, or property and debts due to the business on notes and accounts, at the beginning of the year, from which the debts due by the business on notes and accounts should be deducted,

the balance showing the net stock at the beginning of the year; and then to ascertain in the same way the net stock on hand at the end of the year, the difference between the net stock at the beginning of the year and the net stock at the end of the year being the net profits; and if the jury believe from the evidence that defendant employed plaintiff to act as his clerk in his business as a merchant near Morse's Mill, in Jefferson county, Mo., for the year ending March 25, 1871, and agreed to pay him one-third of the net profits of the business for that time for his services as such clerk, and that plaintiff acted as clerk of the defendant in said business according to his agreement, then the jury will allow plaintiff one-third of the net profits, if any, of said business for that year, to be ascertained by them by the above rule, and may allow interest at the rate of six per cent. per annum on any sum they may find to be due to the plaintiff, to be computed from the time of bringing this suit."

The court refused to instruct the jury that unpaid accounts and notes ought not to be taken into consideration in estimating the amount of net profits.

The exclusion of the evidence offered by defendant, and the action of the court on the instruction above referred to, raise all the points necessary for us to decide in this case. The only issue made by the pleadings was whether there were any net profits, and the amount thereof. The plaintiff alleged that there were net profits growing out of the business during his employment, to such an amount. The defendant denied this allegation. It was not necessary, and, indeed, it would have been improper, for either party to have set forth in his pleading the evidence by which he expected to prove his case. The defendant's books, as kept by the plaintiff, were proper evidence on either side; they were not, however, under the circumstances, conclusive on the plaintiff or defendant. As the books had been kept by the plaintiff, and as he had the management of the business, the defendant had the right to prove that false and fraudulent entries had been made on the books by the plaintiff showing profits that did not really exist. After the plaintiff had used abstracts from the books to prove the amount of profits, it was certainly legitimate for the

defendant to show that false and fraudulent entries had been made by the plaintiff on the books from which these abstracts had been taken, and that by such entries the profits had been apparently increased.

The relation of these parties to each other is settled by the pleadings; they were not partners *inter sese*, nor as to third persons. The plaintiff was to be paid for his agency one-third of the profits. He did not thereby become a part owner either in the goods or the profits. He was simply a clerk for the defendant, having no interest in the stock, nor in the profits as profits. If the defendant refused to pay him his wages he became liable to the plaintiff for damages for a breach of the contract tantamount to one-third of the net profits. The action was not for a settlement of the partnership, but for damages for a violation of the contract of hire. But the rule for ascertaining the damages for a violation of the contract of hire is precisely the same in this sort of case as if it had been a settlement between partners. The rule as laid down by the court was correct, upon the evidence as it stood before the court. If, however, there had been evidence proving that the goods had, from any cause, deteriorated in value, or had increased in value, or that the debts due the store had become of less value, that the debtors were insolvent, etc., it would have been necessary that these considerations should have been entertained in order to reach a correct estimate of the net profits. In short, the same considerations are involved in this case as in the settlement of a partnership. If the issue required the examination of long accounts, it would be in the discretion of the court to refer the trial to a referee instead of a jury. (See Wagn. Stat. 1041, § 18.) That might be the best course in this case; but, as before stated, it rests in the discretion of the court whether to refer it or not.

In estimating the net profits, it was absolutely necessary to take into consideration the unpaid debts and accounts, and deduct the worthless from the good. The plaintiff was not bound to wait till the debts due the store should be collected. He was not the owner of the debts, and had no interest whatever in them. The defendant might let them run as long as he pleased; but he

became liable to pay the plaintiff his hire as soon as the time expired, to be estimated at one-third of the net profits.

Under the view we take of the case, the judgment must be reversed and the cause remanded. Judge Wagner concurs. Judge Bliss absent.

LEVI S. LOOMIS, Plaintiff in Error, *v.* COLEMAN *et al.*, Defendants in Error.

1. *School law — Teachers, employment of — Board of directors — Contracts of, for succeeding year.*—A board of school directors have no power to contract for the services of a teacher after their successors in the school board have been elected and qualified, even though the contract of the old board be made before the commencement of the next school year, *i. e.*, before the third Saturday of April. (Sess. Acts 1870, p. 158, § 98.) The assumed action of the old directors in such a case would be *ultra vires* and void.

Error to Washington Circuit Court.

G. I. Van Alen, for plaintiff in error.

Reynolds & Relfe, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff originally brought this suit before a justice of the peace, for two months' wages as a school teacher, against the defendants, who were the school directors.

In the justice's court plaintiff had judgment, but on an appeal to the Circuit Court there was a finding and judgment for the defendants. The record develops the following facts: The plaintiff entered into a written contract with William Jenkerson and Willis T. Bolduc, as school directors of the district, to teach the public school for the term of four months, commencing April 10, 1871, for the sum of $40 a month, to be paid monthly. Jenkerson and Bolduc, together with one Tebo, were directors for the school year ending on the third Saturday in April, 1871, and the contract of employment was signed on the tenth day of April, 1871, after new directors for the district (the defendants) had been elected and qualified for the year commencing the third Saturday in April,

1871. On the tenth day of April, 1871, the day on which the plaintiff commenced teaching, the defendants, acting in their capacity as school directors, went to him and notified him not to teach; that they did not recognize his contract and would not employ him, and that they had already engaged another teacher. Plaintiff told them that he relied upon his contract and would continue to teach. Defendants never had any further communication with him, but they employed another teacher, furnished her a school-house, and had school taught for the four months in the scholastic year, beginning on the third Saturday in April, 1871, for which they gave her a certificate, as required under the contract and the law.

It is very evident that the only question in controversy is whether the contract between the plaintiff and the old board of directors was binding on their successors. Plaintiff insists that because the statute provides (Sess. Acts 1870, p. 158, § 98) that the school year shall commence on the third Saturday of April, therefore the old board continued in office till that time, and could make valid contracts engaging teachers, and thus anticipate the action of the new board. But section 2 of the school law (*id.* p. 140) fixes the time for holding the election for directors on the second Saturday of April, in each year, and requires the directors elected to qualify within five days thereafter. They may qualify, whenever they are notified of their election, in a shorter time, but it must be done within the limitations prescribed. The directors hold their office till their successors are elected and qualified, and the qualification of the new directors determines and supersedes the powers of the old ones. In the present case the new board was elected on Saturday and qualified on the next succeeding Monday, before the contract was signed between the plaintiff and the old board. It is clear that the old directors were then out of office, and that their assumed action was wholly *ultra vires*.

Again, by section 14 (*id.* 142) it is made the duty of the directors in each sub-district, on or before the third Saturday in April, in each year, to forward to the township clerk an estimate of the amount of funds necessary to sustain the schools in their respective districts for a period of not less than four nor more

than six months. This estimate is to be made and forwarded by the new directors, who will have control of the business, and the employment of the teachers, on a basis which they think their means and circumstances will justify.

The law only requires that a school for four months shall be taught in each year, and it was certainly the intention that the directors should have the employment of the teachers for the current year in which they were in office.

Here the old directors had hired their teacher, and had the school taught for four months during which they were in office, and they attempted to bind their successors by an employment which should last through their term. We are satisfied that the proper construction of the statute is that the directors have no authority to employ a teacher for a period extending beyond the time when their office expires. Section 98, defining when the school year shall commence, has no bearing upon the powers and duties of the directors.

As the case must be affirmed, it is useless to examine the question as to whether plaintiff pursued the proper remedy.

Judgment affirmed. Judge Adams concurs. Judge Bliss absent.

MISSISSIPPI COUNTY, Defendant in Error, *v.* GEORGE W JACKSON *et al.*, Plaintiffs in Error.

1. *Collector, bond of — Motion for judgment, form of.*—In a motion for judgment against a collector and his sureties, under the statute, for moneys due the State (Wagn. Stat 1203, § 128), the motion should describe the official character of the collector, the specific collections made by him, and his default, and the fact that those sought to be charged are sureties on his official bond. But it need not set out the bond in detail. In such case the formalities of ordinary pleading are not required.
2. *Collector, action on bond of — Defenses — Illegal collections — Estoppel.*— A county collector is estopped from setting up, as a defense to an action on his bond therefor, that he acted illegally in collecting moneys, and for that reason is not officially responsible.
3. *Revenue — County jails — Taxes may be levied for.*— County Courts may levy taxes for the building of county jails. The statute (Wagn. Stat. 402) contains no provision which forbids such levy.

Error to Mississippi Circuit Court.

Watkins, Ward and *Patterson*, for plaintiffs in error.

Louis Houck and *G. N. Hatcher*, for defendant in error.

BLISS, Judge, delivered the opinion of the court.

Defendant Jackson was sheriff and tax collector for Mississippi county for the years 1870 and 1871, and the other defendants were sureties upon his bond. The County Court had assessed a tax for the year 1870 called a "jail tax," for the purpose of building a county jail, and at the settlement of Jackson, in February, 1871, as tax collector, about $2,200 was found to be in his hands as collected upon the jail tax, which amount he has never paid into the county treasury. In October, 1871, the plaintiff filed a motion in the Circuit Court, under section 128 of the then revenue act (Wagn. Stat. 1209), to charge the collector and his sureties, and judgment was rendered against them, which is brought here by error.

The defendants first charge that the motion was insufficient in form, inasmuch as it failed to set out the bond in detail, claiming that such motion should contain all the allegations and exhibits of a petition in an original proceeding. The motion recites that defendant Jackson was collector of the county revenue for the years 1870 and 1871; that he collected the county revenue and stands indebted to the plaintiff in the sum of $2,202.65 upon such revenue, called "jail tax," upon settlement with the County Court, on the 8th of February, 1871, according to law; that the amount so found due has not been paid to the county treasurer; that said defendants, Swank and others, naming them, are sureties upon the collector's bond of said Jackson; that said Jackson and said Swank and others, being the present defendants, and a portion only of the sureties, have been notified of this motion: and after the recitals plaintiffs move for judgment.

The statute does not specify what the motion shall contain, only as must be implied from its character and from the notice required. The notice must inform the collector and his sureties

that at the next term of the court a motion will be made for judgment against them for the amount due to the State or county, as the case may be, and for the penalty; and from the character of the motion it is implied that it describe the official character of the collector, the specific collections made by him, and his default, and the fact that those sought to be charged are sureties upon his official bond. It would be well to set out the bond, but the statute does not require it either directly or indirectly, and as this is a purely statutory proceeding, we are not permitted to require the formalities of ordinary pleadings. If we made the requirement, then we must hold parties to the rules of pleading, and, according to them, defendants, before going to trial, must object to informalities or want of clearness and definiteness, that the pleading may be amended. The parties appeared and made no objection to the motion upon this ground. But the motion is not radically defective in this regard. It refers to the official bond of the collector and describes the defendants as principal and sureties upon it. There could be no deception as to its character, and when introduced as evidence it sustained the brief description of it.

Defendants further contend that the County Court had no right to make the assessment called the "jail tax," and therefore all that was collected upon it was a voluntary payment, and the collector is not holden upon his official bond for not paying over the same. To this it may be replied: first, the collector is estopped from setting up the fact, even if true. Armed with his tax-list, and demanding payment according to such list, the payments he receives are made to him in his official character, and he will not be permitted to say that he acted illegally and is therefore not officially responsible for money collected. Inhabitants, &c., v. Moan, 30 Me. 347; and Bell v. R.R. Co., 4 Wall. 508, is a parallel case. But, second, the record does not show that the assessment was illegal. The statute provides (Wagn. Stat. 402, § 1) that there shall be erected in each county a good court-house and jail, and further, that the County Court may issue bonds for the purpose, etc. Counsel contend that because the County Court may build a jail upon credit, that it cannot levy taxes for the purpose. County buildings are ordinarily built out

of the general revenue of the county, and within the limits of that revenue the county authorities may act at their discretion. It cannot be pretended that they must build on credit; that, if the general revenue is sufficient, they are forbidden to use it for that purpose; nor will it be pretended that they cannot regulate the amount to be raised, with reference to the county necessities in that regard. If twenty-five cents on the hundred dollars be sufficient for ordinary expenses, and twenty-five cents more are required for the purpose of building a jail, then the court may direct the levy of fifty cents, and use the money so raised for such ordinary expenses and for such building. But suppose they made the levy separately for each purpose, the tax-books specifying that so much was for a jail, would there be anything unlawful in that, if the whole was within the general limit? Certainly not; and in order to make any show of defense in this regard, it should be shown that this jail tax was over and above the amount the County Court was authorized to levy for the general revenue of the county. This excess does not appear, and there is nothing in this defense.

The other judges concurring, the judgment will be affirmed.

THE STATE OF MISSOURI, Respondent, *v.* BENJAMIN DEFFENBACHER, Appellant.

1. *Criminal law — Indictment — Motion in arrest — Allegation that act was done feloniously.* — An indictment under the statute (Wagn. Stat. 462, § 5) for killing a bull, which fails to allege that the act was done "feloniously," is defective and subject to motion in arrest.

Appeal from Ripley Circuit Court.

S. M. Chapman, for appellant.

WAGNER, Judge, delivered the opinion of the court.

It is unnecessary to examine the objections urged to the rulings of the court on the trial, as we think the indictment is defective, and the motion in arrest should have been sustained. The defend-

ant was indicted under the statute (Wagn. Stat. 462, § 55) for willfully and maliciously killing a bull; but there was no allegation in the indictment that the act was done feloniously.

The section provides that upon conviction the punishment for the act shall be as declared in the next preceding section; namely, "Imprisonment in the penitentiary not exceeding three years, or in the county jail not less than six months, or by fine not less than $250, or by both a fine not less than $100, and imprisonment in the county jail not less than three months."

The term "felony," when used in the statute, is "construed to mean any offense for which the offender, on conviction, shall be liable, by law, to be punished with death or imprisonment in the penitentiary, and no others." (Wagn. Stat. 516, § 33.)

This provision was construed in the case of Johnson v. The State, 7 Mo. 183, and it was held that a statutory felony is an offense for which a party, on conviction, *may* be imprisoned in the penitentiary, and not where, on conviction, he *must* be so imprisoned.

It is the settled law of this State that an offense which is made felony by statute, whether it were a felony at common law or not, must be charged to have been committed feloniously. (The State v. Murdock, 9 Mo. 730.) The word "feloniously" is indispensably necessary in all indictments for felony.

As the indictment was for a felony, and did not charge that the offense was feloniously committed, it was obviously bad, and the court erred in not sustaining the motion in arrest of judgment. For which reason the judgment will be reversed and the defendant discharged.

Judge Adams concurs. Judge Bliss absent.

THE STATE OF MISSOURI, Respondent, *v.* JAMES MCCARRON, Appellant.

1. *Criminal law — Jury, challenges of.* — In a trial for murder, defendant is entitled, under the statute (Wagn. Stat. 1102, § 4), to a full panel of forty qualified jurors before he can be compelled to make his peremptory challenges.

The State of Missouri v. McCarron.

2. *Criminal law — Murder — Evidence — Testimony of wife for co-defendant of husband.*—Where two persons are jointly indicted for murder, and they are tried separately, the wife of one is a competent witness for the other.

Appeal from St. Louis Criminal Court.

L. F. Dinning and ***Chas. Coular***, for appellant.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted jointly with others in the Circuit Court of Washington county for the killing of Samuel Herrington, and on his application a change of venue was awarded to St. Louis county.

Upon a trial in the Criminal Court, he was convicted of murder in the second degree, and sentenced to ten years' imprisonment in the penitentiary. Two points are mainly relied on to reverse the judgment of the Criminal Court: first, that it committed error in impaneling the jury; and, secondly, that it refused to admit competent and legal testimony offered by the defendant. It appears from the record that there were forty men summoned and returned as jurors to try the cause, twelve of whom were called, sworn and examined as to their qualifications and fitness. No objection was made by the State or the defendant as to their competency, and the court then required the parties to make their peremptory challenges before any more jurors were called.

To this ruling of the court the defendant objected, claiming that he was entitled to have a full panel of forty qualified jurors before he could be compelled to make his peremptory challenges, but the objection was overruled and an exception taken and saved.

The statute provides that there shall be summoned and returned in every criminal cause a number of qualified jurors equal to the number of peremptory challenges, and twelve in addition, and no party shall be required to make peremptory challenges before a panel of such number of competent jurors shall be obtained. (Wagn. Stat. 1102, § 7.)

The court surely misconstrued the law. The section is plain; there must be a full panel of competent jurors qualified and obtained before either party can be required to make peremptory

challenges. In this case the number was forty, as the defendant was entitled to challenge twenty peremptorily, and the State eight; and till the whole forty men were called, passed and qualified as jurors, the court could not require either party to exercise the right of peremptory challenging.

The remaining question to be considered is the action of the court in refusing to allow Mrs. Fatchett to testify for the defendant. Her husband, John R. Fatchett, was indicted with the defendant for the murder of Herrington, and had not been tried when this cause was heard. On the objection of the circuit attorney her testimony was ruled out as being incompetent.

This question was considered by this court in a late case (State v. Burnside, 37 Mo. 343), and it was held that when several are jointly indicted for an offense which may be committed by one or more, and they are tried separately, the wife of one defendant is a competent witness for the others, and on separate trials they are entitled to the benefit of her testimony in all cases except in conspiracy or other joint offenses. Upon the separate trial of the co-defendant, except in conspiracy and such like joint offenses, the judgment in the case of the prisoner will neither inure to the benefit or to the injury of the husband, and therefore the rule of law prohibiting the wife from testifying either for or against her husband is not violated.

The judgment must be reversed and the cause remanded. Judge Adams concurs. Judge Bliss absent.

LAUNCELOT A. HARTMAN *et al.*, Respondents, *v.* CYRUS B. SHARP *et al.*, Appellants.

1. *Mechanics' lien—Owner of property—Amendments, etc.*—Where judgment on a mechanic's lien affected only the premises charged with the lien, the contractor, against whom no personal judgment had been obtained in the proceedings, could not raise the objection that new property of the owner had been brought in by amendments to the plaintiff's petition after the same had been originally filed. (See Wagn. Stat. 1004, § 12.)

Appeal from Montgomery Circuit Court.

E. M. Hughes, for appellants.

Sanders & Carkener, for respondents.

ADAMS, Judge, delivered the opinion of the court.

The plaintiffs were lumber merchants, and as such sold to the defendants, Cyrus B. and Andrew J. Sharp, a bill of lumber amounting to the sum of $131.87. The defendants, Sharp & Sharp, had contracted with the owner of lot 4 of block 25 in the town of New Florence, Montgomery county, to build a one-story dwelling-house and other improvements on this lot, and the bill of lumber was furnished and used for that purpose. The contract for building the house, etc., was made with Anthony W. Sharp, the then owner of the lot, but who ceased to be owner, and the defendant Thomas J. Powell became the owner of the premises before the filing of the lien for the lumber.

The plaintiffs, under the mechanics' lien law, filed a lien for the amount of their account against the building and lot, and brought this suit to enforce their lien.

Before suit was brought, the defendants, Sharp & Sharp, became non-residents of the State, and were brought before the court by order of publication. At the return term the plaintiffs amended their petition so as to show with whom the contract was made for building the house, and that the lumber was used for building the house and a fence on the premises. The defendant Powell appeared and filed answer, and defended the suit as owner of the premises. A judgment by default was rendered against the Sharps, who failed to appear or plead; and upon the trial between the plaintiffs and Powell, the court found the issues for the plaintiffs and rendered final judgment against the defendants, Sharp & Sharp, to be levied out of the premises charged with the lien.

Afterwards the defendants, Sharp & Sharp, filed a motion to set aside the judgment upon the ground that amendments were made to the petition as hereinbefore stated. The court overruled this motion, and the defendants have brought the case here by appeal.

By section 12, page 1054, Wagner's Statutes, it is provided that "whenever an interlocutory judgment shall be rendered for the plaintiff, the damages or other relief shall not be other or greater than that which he shall have demanded in the petition as originally filed and served on the defendant; but in any other case the courts may grant him any relief consistent with the case made by the plaintiff and embraced in the issue."

The amendments made by the plaintiffs to their petition did not touch any of the rights of the Sharps. They had no interest in the property to be affected by the judgment. The defendant Powell, as owner of the property, was alone interested in these amendments, and he is not complaining. The judgment against the Sharps is not for any other or greater relief than was prayed for by the petition as originally filed. There is no personal judgment against them, and there could be none on an order of publication.

The judgment only ascertains the amount due the plaintiffs, and is not a personal judgment, but is a judgment *in rem* rendered on the lien against the house and lot. The court did not err in overruling the defendants' motion to set aside this judgment.

Judgment affirmed. The other judges concur.

ELEAZER BLOCK, ADMINISTRATOR, ETC., Respondent, *v.* ARCHIBALD B. DORMAN, Appellant.

1. *Administration — Bills and notes — Suits upon by administrator of administrator.* — Where a note was made to an executrix in her representative capacity, her administrator, in the event of her death, may sue on the note in his own name.
2. *Note given in extinguishment of debt, equivalent to cash, when.* — A note received in full satisfaction and absolute payment of a debt has the same effect in extinguishing the interest as if payment had been made in cash.
3. *Limitations, statute of — Note — Interest — Payment of by one maker — Effect of as to others.* — Payment of interest by one of several promisors in a note, before the statute of limitations attaches, takes it out of the statute as to the others.

Appeal from Cape Girardeau Circuit Court.

G. H. Greene, for appellant.

L. Houck, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The objection made to the capacity of the plaintiff to maintain the action was properly overruled. The plaintiff is the administrator of the estate of Charlotte Block, to whom the note was made payable, and although she is described in the note as the executrix of Simon Block, still that does not prevent the maintenance of this action in the name of the present plaintiff. (Cook's Executor v. Holmes, 29 Mo. 61; Nicolay v. Fritschle, 40 Mo. 67.)

There is no foundation for the defense set up, that there was a previous judgment upon the note which operated as an estoppel to the prosecution of the present suit. The previous action on the note was between different parties, and there was no judgment given on the merits, and therefore there could be no bar concluding the plaintiff here. The material question, however, is whether the action was barred by the statute of limitations.

The note was made by defendant and one Deane, and before the statute commenced running Deane paid the interest on the note, not in money, but by giving his own note therefor, which the evidence clearly shows was received in full payment, and so agreed upon and understood by the parties at the time. It is undoubtedly true that a check or promissory note received for a debt is not payment, if not itself paid, except in cases where it is positively agreed to be received as payment. (Appleton v. Kennon, 19 Mo. 637; Howard v. Jones, 33 Mo. 583.) But here the evidence shows and the court finds that the note was received in full satisfaction and as absolute payment, and therefore it had the same effect in extinguishing the interest as if cash had been paid down.

As to whether payment of interest by one of several promisors in a note, before the statute of limitation attaches, takes it out of the statute as to the others, is a question, I am aware, on which

there exists great diversity of opinion. But this court has decided the question in the affirmative, and held that such payment by one was good to remove the bar as to all. (Craig v. Callaway, 12 Mo. 94.)

Greenleaf lays down the same doctrine, and says the act of making a partial payment within six years, by one of several joint makers of a promissory note, takes it out of the statute of limitations. (1 Greenl. Ev. 174, and note.)

So it has been held that the payment of interest by the principal debtor, before the statute commences to run, binds the surety and prevents its operation as to him. (Lawrence County v. Dunkle, 35 Mo. 395; Whittaker v. Rice, 9 Minn. 13.)

Whatever views might be taken of the question if it were an original proposition, the law must be regarded as settled in this State. Having reached this conclusion and seen that the note was not barred as to the defendant here, who was a co-maker, it becomes unnecessary to examine the effect of the payment made by the assignee of Deane in bankruptcy.

No material errors being shown by the record, the judgment will be affirmed. The other judges concur.

W. C. CALLAWAY *et al.*, Appellants, *v.* STROTHER JOHNSON, Respondent.

1. *Bills and notes — Note given payee for third party, without consideration as to payee — Trusteeship, etc.* — Where it was agreed, at the time of the execution of a note, that either it or its proceeds should go to a third party, in such case the latter would be the substantial creditor; and if the payee gave no consideration for it, he would be a mere naked trustee, and neither he nor his assigns could set up an interest against the real beneficiary.
2. *Garnishment — Note — Payee, agreement of as to maker — Estoppel, etc.* — In garnishment proceedings wherein the maker and payee of the note were both made defendants, if the payee, by an agreement or arrangement, had the garnishment proceedings dismissed as to him, with the understanding that the judgment should be taken against the maker, he could not afterward be heard alleging that he was not bound thereby.

Appeal from St. Charles Circuit Court.

E. A. Lewis, for appellants.

Wm. A. Alexander, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a suit upon a promissory note, brought by the plaintiffs as assignees of William B. Callaway. The bill of exceptions develops substantially these facts: that at the time the note was executed, Howard Callaway (a son of William B.) and W. W. Love had been selling goods in partnership at O'Fallon, in St. Charles county, and had become embarrassed in their financial affairs; that they discontinued business at O'Fallon, and moved what goods they had left to Trenton, Illinois, and sold them to the defendant, who was doing business at that place. Defendant gave the note herein sued on for the purchase-money, and was requested by Love & Callaway to execute the same to William B. Callaway for the reason, as given at the time, that the firm owed a debt of honor to Carey A. Boyd, which they wished to pay in preference to others, that William B. Callaway should pay the money over to Boyd when collected, or deliver him the note, and that Boyd would be sure to get his money in preference to others. Thereupon the note was executed, neither William B. Callaway nor Boyd being present at the time. Afterwards Boyd had the note in possession, and presented it to defendant for payment, but no assignment was on it, and defendant made a small payment, which was credited thereon and signed by Boyd. Previous thereto an attachment suit was commenced in the St. Charles Circuit Court by Boyd, against Love and Howard Callaway, upon which William B. Callaway and the defendant Johnson were summoned as garnishees. While these garnishments were pending, Boyd obtained judgment against the firm of Love & Callaway, and William B. Callaway told Boyd's attorney that he would resist the obtaining of any judgment in Boyd's favor against himself. The attorney then told Callaway that if he got a judgment against Johnson, the defendant here, he would dismiss the garnishment process against him, to which Callaway

offered no objection. The attorney said that he only wanted to collect the note once, and it made no difference from whom it came; that the money on the note was to go to Boyd. The attorney then stated that in accordance with this understanding he dismissed the process of garnishment against William B. Callaway, and afterwards obtained judgment against defendant Johnson, upon his answer, for the amount acknowledged by him to be due upon the note, the greater part of which judgment Johnson has since paid.

No answer to the interrogatories was ever filed by William B. Callaway previous to the dismissal of the proceedings against him.

There was also evidence tending to prove that when Howard Callaway first went into business, his father, William B. Callaway, advanced him $2,000, of which $1,000 was a gift and the remainder a loan, and that the loan of $1,000 was still due and unpaid by Howard at the time of the execution of the note sued on; that William B. Callaway died, and that the note sued on was found among his effects; that during his last sickness he made the assignment on the note to his two children, stating that this was necessary in order to make them even with his other children.

Upon these facts the court, by an instruction of its own, told the jury that the execution of the note and the assignment were admitted, and the verdict should be for the plaintiff for the amount due on the note, with interest, unless it had been shown to their satisfaction that the note sued on was for the benefit of Boyd, and without any consideration from defendant to William B. Callaway, the payee, and that the only consideration for the note was an indebtedness from defendant to Love & Callaway; or that William B. Callaway, the payee, agreed and undertook with the defendant that the note was to be discharged in full by a judgment against defendant as garnishee on a process in favor of Boyd, against Love & Callaway, and that such judgment was rendered in pursuance of such understanding and agreement; and if the facts as thus stated were proven to the satisfaction of the jury, then their verdict should be for defendant. The court further instructed the jury that the judgment against the defendant as garnishee did not deprive William B. Callaway or his assigns

of any interest he might have had in the note, unless he agreed that such judgment should discharge the note. The jury found a verdict for the defendant.

I think the declaration of law fairly submitted the case. The broad proposition of law is stated that the judgment against the defendant upon garnishment did not bind William B. Callaway or his assigns, and they were entitled to recover on the note unless the same was given for Boyd's benefit, and Callaway gave no consideration therefor, or unless there was an understanding and agreement that the judgment against the defendant should be a satisfaction of the note. If it was agreed and understood, at the time the note was executed, that either it or the proceeds should go to Boyd, then he was the substantial creditor; and if Callaway gave no consideration for it, he was a mere naked trustee, and neither he nor his assigns could set up an interest against the real beneficiary; and if Callaway, by an agreement or arrangement, had the garnishment proceedings dismissed as to him, with the understanding that judgment should be taken against the defendant, he could not afterwards be heard in alleging that he was not bound thereby. The evidence was for the jury, and by their verdict they have found that these facts existed. The defendant seems to have acted in the most entire good faith throughout, and Callaway stood by and permitted him to pay out his money on the judgment. The equities and justice are all on the side of the verdict. There was no error in refusing the plaintiff's instructions, for whatever correct law they contained had already been given by the court.

Judgment affirmed. Judge Adams concurs. Judge Bliss absent.

REBECCA WHALEY, Appellant, *v.* FRANKLIN WHALEY *et al.*, Respondents.

1. *Dower—Widow, title of to growing crop.*— Under the statute law of Missouri, where the widow has no dower assigned to her, the growing crop on the land of her deceased husband goes to his executor or administrator and not to the widow.

Appeal from Marion Circuit Court.

E. G. Pratt, *R. E. Anderson*, and *Benj. Davies*, for appellant.

H. S. Lipscomb, with *Dryden & Dryden*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The only question presented for our determination in this case is whether the growing crop of a deceased person goes to the widow or to the executor or administrator. The record shows that William Whaley owned a piece of land, and that in the fall he plowed the same and sowed it in wheat; that in February thereafter he died, and that his executor harvested the wheat and sold the same as assets belonging to the estate. No dower having been assigned, the widow claims all the wheat as her absolute property, and brought her action of trespass against the executor for taking and carrying the same away. The court gave judgment for the defendant.

It is claimed that because the statute says that, until dower be assigned, the widow may remain in and enjoy the mansion-house of her husband, and the messuage or plantation thereto belonging, without being liable to pay any rent for the same (Wagn. Stat. 522, § 21), therefore she is entitled to the crops on the place at the time of her husband's death. This construction has never been placed upon the statute before, and the practice from the earliest period of the State has been opposed to it.

That the statute intended that the crops or emblements should descend as assets, is clearly inferable from the language employed in the administration law, authorizing the administrator to take care of and bestow labor on the same. (Wagn. Stat. 90, § 52.) As a general rule, emblements or annual crops growing upon the land of one who dies before they are harvested, go to the personal representatives. (1 Washb. Real Prop., 3d ed., 119; 1 Williams' Ex. 594.)

By the common law the widow is entitled to the crops growing at the death of her husband, upon that part of the homestead farm

which is sssigned to her by the heir for her dower; but it does not thence follow that where dower is not assigned to the widow, and she continues in possession of the mansion-house and plantation of her husband, under the provisions of the statute, she is entitled to the growing crops upon the farm at the time of her husband's death. By the common-law rule she is entitled to the crop only when dower is assigned by the heir, and then only on the part assigned for dower. (Dyer, 316; 2 Inst. 81.) Besides, she does not take it under her quarantine, for which the provision in our statutes is a substitute, but she takes it as tenant in dower. There is nothing in the rule of the common law which can make it a guide for the construction of the statutes. On the other hand, the rule contended for, as applied to the crops of the whole plantation, would be partial in its operation and often productive of great injustice. It could apply only to those occupying plantations, and it would enable the heir, in many instances, by refusing to assign dower, to do great wrong to legatees and creditors. The growing crops not unfrequently constitute a large proportion of the assets of an estate, and our existing law, it seems to me, has made a substitute in this case by making a fixed provision for the widow out of the personal estate, against the claims of all creditors. (Wagn. Stat. 88, §§ 33–35.)

In other States, where similar statutes to ours exist, the point has been decided in accordance with these views. In the case of Budd v. Hiler, 3 Dutch. 43, it was held that crops growing on the homestead farm at the time of the testator's death, go to the devisee if the land is devised; and if there is no devise of the land, then to the executor of the testator, and not to the widow, who remains in possession until her dower is assigned. (See also Parker v. Parker, 2 Pick. 236; Kaim v. Fisher, 2 Seld. 597.)

I think the court below decided the case rightly, and I advise an affirmance.

Judgment affirmed. The other judges concur.

JOHN D. FOSTER AND SAMUEL DENTON, Plaintiffs in Error, *v.* WILLIAM EVANS, Defendant in Error.

1. *Ejectment, judgment in — Subsequent suit — Defenses, etc.*—A judgment in ejectment is no bar to another suit, or to defenses set up in a subsequent suit, unless the titles and defenses are precisely the same as in the first suit.
2. *Ejectment — Plaintiff in, must stand on his own title.*—A plaintiff in ejectment must first show title in himself before he can have any standing to disturb defendant's possession.
3. *Lands and land titles — Grant of land to States — Entry with register, etc.*—A grant of land to the State, under the act of September 28, 1850, for reclamation of swamp lands, reserved it from sale by ordinary entry with the United States register or receiver.

Error to Scott Circuit Court.

Louis Houck, for plaintiffs in error.

J. M. Patterson, for defendant in error

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment to recover possession of a tract of land in the county of Scott. The plaintiffs claim title by virtue of an entry at the United States Land Office at Ironton, Missouri, dated May 17, 1857, made by Abraham Hunter. No patent was, however, shown to have been issued on this entry. The plaintiffs also set up a judgment in ejectment in the name of said Hunter, rendered against the defendant in 1861, for this land, but it was not shown what titles were investigated and passed upon in that ejectment suit. The plaintiffs then gave evidence conducing to show that the defendant had leased this land from them, or one of them, for a year or more, and that he had offered to buy the land from them.

The defendant stood upon his possession, and gave evidence conducing to show that he had been in adverse possession for more than ten years before the commencement of this suit, and evidence conducing to show that he never had leased the land from plaintiffs, and had only offered to buy the land if the plaintiffs had a better title. The defendant also set up the averment that the tract of land in controversy was swamp land, and that it so ap-

peared on the books in the office of the clerk of the County Court, and that, as such, one John W. Carpenter bought the land; and the deed from the county to Carpenter was read in evidence, showing that it was swamp land granted to the State of Missouri by virtue of an act of Congress entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 8, 1850.

The court, at the instance of the plaintiffs, instructed that if the defendant rented the premises in controversy from the plaintiffs, then the plaintiffs were entitled to recover. There was conflicting evidence on this question, and the court found for the defendant, and we are not at liberty now to disturb that finding.

The court refused the other instructions asked by plaintiffs. One was that the judgment in the ejectment suit of Hunter against defendant settled this case, and the other was that if the defendant offered to purchase this land from the plaintiffs within ten years before the commencement of the suit, that would entitle the plaintiffs to recover.

In regard to the effect of a judgment in ejectment, it may be remembered that it is not a bar to another suit, or to defenses set up in a subsequent suit, unless the titles and defenses are precisely the same as they were in the first suit. There is no evidence here that the same titles and defenses were set up in the former suit as were relied on in this.

If a plaintiff in ejectment has no title himself, the mere fact that a defendant in possession offers to buy the land from him confers upon him no right to recover the possession, nor does such an offer stop the running of the statute of limitations when it is made to quiet the defendant's title.

The main question here is whether the plaintiffs themselves have shown any title. A plaintiff must first show title in himself before he can have any standing to disturb the defendant's possession. The only title relied on was a simple entry of the land with the United States register and receiver, upon which no patent has ever been issued; at least none was shown.

The evidence shows that this was swamp land, and had been selected as such under the act of Congress above referred to.

What right had the register and receiver to permit an entry of this land after it had been thus granted to the State of Missouri?

It is unnecessary to inquire whether this grant to the State conferred a complete title without a patent or not. It is sufficient that it reserved it from sale by ordinary entry with the United States register and receiver. (See Hann. & St. Jo. R.R. Co. v. Smith, 41 Mo. 310.)

Under this view the plaintiffs had no standing in court, and the judgment was for the right party.

Judgment affirmed. The other judges concur.

MARTIN A. BIERWIRTH, ADMINISTRATOR OF WILLIAM BIERWIRTH, DECEASED, Defendant in Error, *v.* ANDREW GIBONY, Plaintiff in Error.

1. Judgment affirmed.

Error to Cape Girardeau Court of Common Pleas.

ADAMS, Judge, delivered the opinion of the court.

This action was founded on the following instrument of writing, entered into between the plaintiff's testator and the defendant: "Know all whom it may concern, that I, A. Gibony, have leased to William Bierwirth a part of ground situated north of the bridge, east of German street, adjoining his brick house, for a period of ten years, at the rate of fifteen dollars a year, payable in advance. The conditions of this contract are as follows: The said William Bierwirth is allowed to put up such buildings as may suit him, and at the expiration of ten years the said A. Gibony is to allow him what two disinterested men will agree the buildings are worth. If the condition is not complied with, the contract shall be null and void. William Bierwirth is to pay the taxes on the buildings he erected on the above leased ground.

"In witness whereof we have put our hands and seals this day, January 22, 1857. A. GIBONY, [SEAL]
WILLIAM BIERWIRTH [SEAL]."

The petition alleges that the plaintiff's intestate entered into the premises and occupied them under the lease, paid the rent, etc., and erected buildings under the conditions in the lease, and that the premises, with the buildings thereon, had been delivered up to defendant and his assigns at the expiration of the lease; that the value of the buildings had been assessed and determined by Joseph Lausman and Casimer Strauss, two disinterested men, to be worth $325, and the plaintiff claimed damages to this amount.

The answer denied the material allegations of the petition, but did not deny that the buildings had been valued by the men named at $325, but denied that the men were disinterested or selected by the defendant.

Upon the trial the plaintiff gave evidence conducing to prove the allegations of the petition, and evidence was given on both sides in regard to the value of the buildings erected on the leased premises. The court gave instructions on both sides in regard to the proper measure of damages, which seem to be somewhat conflicting, but under the view we take they need not be recited.

The contract sued on is very inartificially drawn, but was intended by the parties to be valid in all of its bearings. The condition on which it was to become void was the non-payment of the taxes on the buildings to be erected. The party would have no right to recover for the value of the buildings if he had left them encumbered by taxes, but there was no proof in the case that there were any unpaid taxes.

The measure of damages for the buildings was fixed by the contract, and they were to be what two disinterested men might determine them to be worth.

The proof corresponds with the allegation that the two men who assessed the buildings were disinterested, and that they valued them at $325. The verdict was for that amount, and is for the right party.

Let the judgment be affirmed. The other judges concur.

WILLIAM J. PRESTON, Plaintiff in Error, *v.* THE MISSOURI AND PENNSYLVANIA LEAD COMPANY, Defendants in Error.

1. *Corporations — Bills and notes — Agent, authority of to draw bills, may be conferred by corporation by parol.* — The officers of a corporation, unless prohibited by the charter, may confer authority upon its agent to draw and execute bills of exchange on behalf of the company. No action in writing on the part of the board of directors is necessary in order to vest such authority in the agent.

Error to Washington Circuit Court.

Dillingham and *Dinning*, for plaintiff in error.

I. Corporations, like natural persons, are bound by the acts and contracts (though not under seal) done by their agents and made within the scope of their authority, and parol evidence is admissible upon the agency and authority. (29 Mo. 68; 33 Mo. 354; 28 Mo. 415–491; 30 Mo. 118, 452; 38 Mo. 228; 5 Kent's Com. 292; Ang. & Ames on Corp., §§ 294, 297; Sto. Agency, 53.)

II. As the appointment of an agent may be implied from the recognition of his acts or the permission of his services, so may the extent of his authority, from the powers usually given to one in his station. (Ang. & Ames on Corp. 339; Sto. Agency, 75.)

III. In general, the appointment and authority of an agent of a corporation may be implied from the adoption or the recognition of his acts by the corporation or its directors. (14 Barb., N. Y., 358; 1 Doug., Mich., 106; 12 Ala. 772.)

IV. Acts of a corporation may be proven in the same manner as the acts of individuals. (30 Mo. 118; Ang. & Ames on Corp. 328.)

Reynolds & Relfe, for defendant in error.

Not only must the agent be authorized by the directors, but by the directors as directors; and the mere fact that some of the directors were present when the note was drawn, is not even a circumstance to show that they authorized it officially. (President, etc., of Westfield Bank v. Corner, 37 N. Y. 320; Central Bank v. Empire Stone Dressing Co., 26 Barb. 23; Ang. & Ames

on Corp., § 238.) The best evidence of this, though of course not the only evidence, was the books of the company. Plaintiff never laid the foundation for parol evidence of the proceedings of the directors by showing that their books made no mention of the transaction, or were absent in the custody of defendant, and the charter of the company expressly required books to be kept.

ADAMS, Judge, delivered the opinion of the court.

This was a suit commenced by attachment on a bill of exchange alleged to have been drawn by the defendants on Charles Gibson, at six months, in favor of one Long, who delivered it to one Walbridge; that Walbridge afterwards sold it to plaintiff; that the bill was accepted by Gibson, but was not paid on presentment, of which the defendants had due notice, and that defendants had no funds in the hands of Gibson to meet his bill. The plaintiff alleged that the chief office of business of defendants was outside of the State of Missouri, and on this ground the attachment was issued.

The defendants filed a plea in abatement of the attachment, which was tried and resulted in a verdict in favor of defendants, and judgment dissolving his attachment. A motion for a new trial was filed and overruled, but no exception was saved to this action of the court, and no further notice will be taken of it.

The defendants then filed an answer denying the execution of the bill of exchange, and set up other defenses which it is unnecessary to detail, as no action was had on them. The plaintiff, to sustain the issues on his part, offered evidence conducing to prove that the bill of exchange was drawn by one Poor as secretary of the defendants, and that Poor had been in the habit of drawing such bills; also evidence conducing to show that the bills so drawn had been paid by the company; and he offered to prove by parol that this bill had been authorized to be drawn at a meeting of the board of directors. The plaintiff also offered to prove that this bill was given in purchase of land for the company, and offered to read the charter and amended charter of the company, all which evidence was rejected by the court, for the alleged reason that the books of the company must show the action of the board

of directors in authorizing this bill to be drawn, and that plaintiff had no right to resort to secondary evidence without accounting for the non-production of the books.

The plaintiff offered to read the bill to the jury upon the evidence offered, and the court refused to permit him to do so, upon the ground that there had been no competent proof offered of its due execution.

The plaintiff took a nonsuit, with leave to move to set it aside, and did file a motion to set it aside, which was overruled; and this ruling, as well as the ruling of the court in rejecting his evidence, was duly excepted to.

The charter of this company authorizes it to purchase and dispose of real estate for the purposes of its business, and, like other corporations, it is authorized to contract and be contracted with. Its business is conducted by a board of directors, but the charter does not require that the acts of the board of directors shall be recorded or kept in writing. There is nothing in the charter requiring contracts by the company to be executed in any particular mode.

I take it that this company had the power to execute bills of exchange in the purchase of lands to be used for the purposes of its creation, and might do so through any of its officers authorized to draw such bills. This authority need not be proved by writing, or by the books of the company. If such authority was in writing and entered on the books of the company, then it might be a question whether the evidence offered was legitimate, and whether it was not secondary evidence; but that question is not properly before this court. It was not admitted that there was written authority upon the books, but the objection seemed to be that there could be no parol authority for drawing bills, and that to prove the proper execution of such bills the action of the board of directors in writing must be produced. This doctrine has long since been exploded. The old rule, requiring the acts of a corporation to be manifested by its corporate seal, was set aside at an early day in this country. In 1813 the Supreme Court of the United States (Bank of Columbia v. Patterson, 7 Cranch, 299) held that "whenever a corporation is acting within the scope of the legitimate

purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie." Afterwards, the same court, in The Bank of the United States v. Dandridge, emphatically declared that the acts of a corporation, like those of a natural person, might be proven by parol where the charter did not require a different rule of evidence; and that, when the charter did not require the acts of the board of directors to be in writing, they might transact their business by parol. The opinion of the court was delivered by Judge Story. Chief Justice Marshall, however, delivered a dissenting opinion, holding that although the old doctrine in regard to seals was exploded, yet the acts of a corporation through its directors must be in writing, and that the only way in which such an ideal being could manifest its acts was by writing.

The learned Chief Justice presided over the Circuit Court in Virginia, from which this appeal was taken, and his dissenting opinion, upholding the views of the Circuit Court, was very able and elaborate. In the conclusion of his opinion he used this language: "I have stated the view which was taken by the Circuit Court of this case. I have only to add that the law is now settled otherwise, perhaps to the advancement of public convenience. I acquiesce, as I ought, in the decision which has been made, though I could not concur in it."

The doctrine laid down by the court has been advanced by the courts of Massachusetts and other States, and has been followed without dissent, so far as I know, ever since. (Christian University v. Jordon, 29 Mo. 68; Southern Hotel v. Newman, 30 Mo. 118; Buckley v. Briggs, 30 Mo. 452; Fayles v. National Ins. Co., 49 Mo. 380; Western Bank of Missouri v. Gilstrap, 45 Mo. 419; 2 Kent's Com. 291; Davenport v. Peoria Ins. Co., 17 Iowa, 276; Dunn v. Rector, 14 Johns. 118; American Ins. Co. v. Oakly, 9 Paige, 496; Magill v. Kaufman, 4 Serg. & R. 317; Ang. & Ames, § 237; Dillon on Mun. Corp., § 383 and notes.)

The charter of the defendants was passed in 1864, and amended in February, 1865. The act concerning corporations, approved

November 23, 1855, was then in full force, and such parts of this statute as were not excluded by this charter entered into and formed a part of it. Section 8 of the above act provides that "parol contracts may be binding upon aggregate corporations if made by an agent duly authorized by a corporate vote or under the general regulations of the corporation, and contracts may be implied on the part of such corporations from their corporate act, or those of an agent whose powers are of a general character."

This section is only declaratory of what the courts uniformly held the law to be, before its passage, and does not abrogate any of the doctrines laid down by the courts in regard to the proof of corporate acts by parol, or the ratification of the acts of their agents. In my judgment a corporation may ratify the acts of an agent in the same manner as a natural person, unless it is prohibited by the express provisions of its charter.

Under this view the judgment must be reversed and the cause remanded. The other judges concur.

The reversal does not apply to the proceedings on the attachment. The action of the court in regard to the attachment must stand affirmed.

FREDERICK W. GATZWEILER, SHERIFF OF ST. CHARLES COUNTY, TO USE OF ADMINISTRATOR OF JOHN ADAMS *et al.*, Respondents, *v.* ALBIN MORGNER *et al.*, Appellants.

1. *Sale — Solvency of possession — Bill of sale, etc.* — The title to goods and chattels passes with delivery of possession under a contract of purchase. A bill of sale subsequently executed is merely evidence of the transfer of title, and not at all necessary to its completion.
2. *Execution — Bond of indemnity — Proceedings in execution, how far bond must show.* — The proceedings on execution, referred to in a bond of indemnity given to a sheriff by plaintiff in the execution, enter into and form a part of it as fully as if such proceedings are recited *in hæc verba*. And the bond is not invalid by reason of its failure to set out such proceedings in detail.

Appeal from St. Charles Circuit Court.

E. A. Lewis, for appellants.

W. A. Alexander, for respondents.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a bond of indemnity given by the defendant Morgner as principal, and the other defendants as his sureties, to the plaintiff, as sheriff of St. Charles county, requiring him to proceed with the sale of certain goods and chattels levied on under an execution in favor of Morgner against one Barron, and which were claimed by Adams and Miller, for whose use this suit was brought.

Barron, the defendant in the execution, had been a partner in a store with the claimants, and testified that on the 9th day of September, 1865, he sold out his interest in the partnership goods to his co-partners, the claimants in this case; that the terms of the sale were that they allowed him credit for the amount of his private account, which, by the terms of the sale, was considered as paid, and that the claimants assumed all the debts of the partnership, and assumed to pay the notes he had given when he purchased the goods, on which they were his sureties, and that he delivered them the goods, and ceased to have any further control from that time, and that they hired him as clerk. He further stated that there were no writings executed on the 9th, although the sale was completed on that day. He also stated that, two or three days afterwards, he executed to them a bill of sale.

The execution was issued and delivered to the sheriff on the 11th of September, 1865, and levied on the 12th of the same month. There was evidence on the part of the defense, to the effect that one of the claimants, on the evening of the 9th of September, said he was going to buy out the store, and did not say that he had bought it out. The defendants make the point here that the sale was not completed till the bill of sale was executed; that the whole matter was *in fieri* till the delivery of the bill of sale; and, consequently, the title was in Barron when the execution was delivered to the sheriff.

As a matter of law, a bill of sale is not necessary to pass the title to personal property. A delivery of the possession of goods under a contract of purchase passes the title, and from that time they belong to the vendee and are at his risk. There is no question of fraud as to creditors raised here. The simple question is whether the title to the goods in dispute passed, as between the parties to the sale on the 9th of September. The goods were already in the actual possession of all the partners, and the outgoing partner ceased to be such as soon as the terms of the sale were agreed upon, and as soon as he abandoned the possessions, leaving his copartners in the control of the premises under the purchase. The bill of sale subsequently executed was only evidence of what had already fully transpired, and was not at all necessary to its completion.

Whether the sale and delivery took place, as stated by the witness, was for the court sitting as a jury to find, and as the court found this issue for the claimants, we do not feel at liberty to disturb the verdict.

The instruction asked by the defendants was properly refused. It consisted of a long list of facts, to be found before there could be any recovery by plaintiffs, and amounted in substance to a demurrer to the evidence upon which his right to a verdict rested.

The defendants also objected to the bond of indemnity as evidence, upon the ground of variance. The alleged variance consists in the seeming inconsistency in the levy, as recited in the condition of the bond, and as set forth in the petition and return as made by the sheriff on the execution. The objection is more plausible than real. The bond of indemnity was a continuation of the proceedings on the execution, and grew out of and formed a part of them. Those proceedings being referred to in the bond, and, in fact, being the occasion of the bond, entered into and formed a part of it as fully as if they had been recited *in hæc verba*. So, if the recital in the bond is apparently imperfect, it is cured by the legal effect of the instrument, which, in law, forms a part of the sheriff's proceedings under the execution.

The judgment will be affirmed. Judge Wagner concurs. Judge Bliss absent.

W. B. HAZELTINE, Respondent, *v.* GUSTAVE REUSCH, Appellant.

1. *Justice's Court — Judgment — Appeal, etc.* — The failure of a justice to enter up a formal judgment on a verdict will not prevent an appeal to the Circuit Court. The effect of such judgment should be given to the verdict as soon as entered on the docket.
2. *Injunction — Technical errors, release of.* — Whatever technical errors may exist in proceedings that are prayed to be enjoined are released by the injunction. (Wagn. Stat. 1030, § 10.)

Appeal from Warren Circuit Court.

Rosenberger & Diggs, for appellant.

Morsey, Orrick & Emmons, for respondent, cited 27 Mo. 224, and 39 Mo. 120.

WAGNER, Judge, delivered the opinion of the court.

This appeal is prosecuted from a judgment of the court below dissolving a temporary injunction. It appears from the record that the plaintiff sued the defendant before a justice of the peace, and on a trial before a jury a verdict was rendered in the defendant's favor. On the same day the plaintiff filed his affidavit and bond, and perfected his appeal to the Circuit Court.

The justice failed to send up the transcript in time for a trial at the next term of the Circuit Court, after the proceedings were had before him, but it was filed in time for a hearing at the next succeeding term. When the case was reached on the docket the defendant made no appearance, and the plaintiff had judgment. Subsequently an execution was issued, and the defendant presented his petition to the judge of the Circuit Court, seeking to enjoin the collection of the money. A temporary restraining order was granted, but, upon a final hearing, it was dissolved.

Several questions are raised here, but they are technical in their character and have little merit.

It is contended that because the justice did not enter up a formal judgment on the verdict, therefore no appeal would lie. But this court has never applied the precise and rigid rules of practice to proceedings before justices of the peace. The justice has not the

discretionary control over verdicts, possessed by a court of record, and he is required to enter the verdict of the jury on his docket, and give judgment accordingly; and it has therefore been decided that the effect of a formal judgment ought to be given to a verdict as soon as it is entered on a justice's docket. (Rutherford v. Wimer, 3 Mo. 12; Franse v. Owens, 25 Mo. 329; Morse v. Brownfield, 27 Mo. 224.)

Again, it is said that there was nothing to show that the Circuit Court had jurisdiction at the time it gave the judgment. When this petition was heard it seems that the papers could not be found, but it was conclusively proven that when the trial was had in the Circuit Court, and the judgment rendered, the affidavit and the appeal bond were both among the papers in the clerk's office. Moreover, the defendant did not show any equitable claim to relief. No evidence was introduced to show that the judgment was unjust, or that he did not owe the debt. Whatever technical errors may have existed in the proceedings that were prayed to be enjoined, were released by the injunction. (Wagn. Stat. 1030, § 10.)

Wherefore it results that the judgment must be affirmed. Judge Adams concurs. Judge Bliss absent.

IRENE SPRADLING *et al.*, Plaintiffs in Error, *v.* WILLIAM S. CONWAY *et al.*, Defendants in Error.

1. Res adjudicata — *Merits must be passed on — Evidence, record of — Parol, testimony as to.* — Where the merits of a matter in dispute are not passed on, the judgment therein will be no bar to another action; and where the record does not positively show what was passed on, parol evidence may be resorted to.
2. *Distribution of estate — Testimony of the widow, etc.* — In a proceeding for the distribution of the estate of a deceased person, his widow is a competent witness, the deceased having no interest in the controversy; but her testimony as to confidential conversations with her husband should be excluded on the ground of public policy.

Error to St. Francois Circuit Court.

At the time this suit in the Probate Court was brought, Mrs. Orten her husband and Mrs. Conway, children of deceased, Sprad-

ling, were all dead, and the design of the petition was to make the children of Mrs. Orten and the children and grandchildren of Mrs. Conway, grand and great-grandchildren of said Spradling, account for advancements which it was alleged their respective mothers had received in the lifetime of William Spradling.

Reynolds & Relfe, for plaintiffs in error.

Clardy, Taylor & Robinson, for plantiff in error, cited in argument Herman's Law of Estoppel, §§ 79, 86, 98; 1 Greenl. Ev., §§ 529, 530; Lawrence v. Hunt, 10 Wend. 80; Wood v. Jackson, 8 Wend. 10; W. Steam P. Co. v. Sickles, 24 How. 333; Loaker v. Davis, 47 Mo. 140.

F. M. Carter and *P. Pipkin*, for defendants in error.

A judgment is conclusive upon all points directly involved and necessarily determined. (2 Phill. Ev. 17, note 262; Offut v. John, 8 Mo. 123; Clemens v. Murphy, 40 Mo. 121; Bennett's Adm'r v. Russell's Adm'r, 39 Mo. 155; McDowell v. McDowell, 1 Bailey's Ch. 324; 2 U. S. Eq. Dig., 122; Martin *et al.* v. Barron, 37 Mo. 301; 2 Phill. Ev., see notes p. 91.)

The cause of action as to the distributees was entire. Consequently the estoppel of the judgment or decree in partition will extend to the whole case, and it cannot be shown that any part was withheld from the consideration of the court. (Hess v. Heble, 4 H. R. 246; 6 H. R. 57; Carmell v. Garregues, 5 Barr, 52; Embury v. Cornell, 3 Comst. 371; Fish v. Foley, 4 Hill, 54; Duffy v. Lytle, 5 Watts, 130; Fairington v. Payne, 15 Johns. 432.)

This rule admits of no exception, and cannot be relaxed even on the clearest proof that no evidence was given as to part of the demand in controversy (Miller v. Marice, 6 Hill 121; Ramsey v. Herndon, 1 McLean, 450), or that it was overruled by the jury in rendering their verdict. (Brockway v. Kenney, 2 Johns. 210.)

The court properly excluded the testimony of Mrs. Spradling. She was not competent under the statute, and what she heard Orten say after the death of Spradling, and after he ceased by the death of his wife to have any interest in the land deeded to

his wife by way of advancement, as stated in petition, was hearsay, and could not affect the children of Mrs. Orten. (Nelson v. Bush, 9 Dana, 104.)

The case of Looker v. Davis, 47 Mo. 140, is not in point for the plaintiff, and, if it were, it will be observed that that opinion was delivered with hesitancy. In this case the advancements were the cause of action, and as to whether Orten received them was a question of fact attempted to be proven by Orten's declarations. Such declarations certainly could not be proven after his death by a party to the suit.

ADAMS, Judge, delivered the opinion of the court.

This was a proceeding commenced in the Probate Court of St. Francois county for distribution of the estate of William Spradling among his distributees. It was alleged that certain of the distributees, being grandchildren of the deceased, had through their ancestors received advancements, and it was asked that these advancements should be accounted for as so much to be deducted from the shares of the parties who received them. The alleged advancements were disregarded by the Probate Court, and the plaintiffs appealed to the Circuit Court; the Circuit Court disregarded the advancements, and the plaintiffs have brought the case here by writ of error.

Upon the trial in the Circuit Court evidence was given conducing to show that the advancements had been made by the common ancestor of the parties, as alleged in the petition.

The defendant then procured the record of a judgment in partition for lands which had descended to the parties, and claimed that this judgment was a bar to any consideration of the supposed advancements in this case. In the suit referred to, the petition for partition mentions these advancements and asks that they may be allowed and deducted in the partition of the lands.

But the evidence adduced shows that the alleged advancements were not taken into consideration, and were not mentioned in the trial of the partition case. The court nevertheless held that the judgment in the partition case was an adjudication of the advancements, and that they would not be considered in this case. It is

a well-settled principle that when the merits of a controversy have once been fairly passed on by a court of competent jurisdiction, it is not open to inquiry between the same parties or privies in any other suit or proceeding, and such judgment must stand unless it was obtained by underhand or fraudulent contrivances. It is equally well settled that if the merits of the matter in dispute were not passed upon, the judgment is no bar to another action. (See Bell v. Hagland, 15 Mo. 360; Clemens v. Murphy, 40 Mo. 121; Wright v. Salsbury, 46 Mo. 26; Wells v. Moore, 49 Mo. 229, one of the cases cited.) When the record does not positively show what was passed on, parol evidence may be resorted to. In the case at bar the parol evidence showed that the advancements were not spoken of on the trial, and the judgment shows that they were not deducted. Whether there were any such advancements is a matter for the court to determine upon the evidence. But the court below did not take into consideration, so far as we can see, the evidence that these advancements were not before the court in the partition case.

The widow of Spradling, deceased, was a competent witness to testify in the case. The deceased had no interest in this controversy. It was a matter of controversy between the distributees, and any of the parties to the suit were competent witnesses. (See Garvin's Adm'r v. Williams, decided March term, 1872.) A widow, though competent as a witness, cannot be allowed to testify as to confidential conversations from her husband. This sort of testimony is excluded on the ground of public policy. (See Moore v. Moore, *ante*, p. 88.)

The declarations of the husband of Mrs. Orten were not competent as against her children. They derived their estate from their mother, and not from their father, and he had no power to impress the interest thus inherited by his declarations.

Under this view of the case the judgment must be reversed and the cause remanded.

Judge Wagner concurs. Judge Bliss absent.

WILLIAM A. JACKSON, Plaintiff in Error, *v.* RICHARD C. MAGRUDER AND L. B. MAGRUDER, Defendants in Error.

1. *Administration — Equity of redemption — Probate Court, order of touching.* —Under the administration law, the Probate Court has power, on the application of the administrator or a creditor of the estate, to make a general order for the sale of real estate, embracing equities of redemption and all other interests in lands.
2. *Administrator — Sale by, under act of 1857 — Newspaper advertisement, etc.* — The judgment of a County Court approving the report of a sale made by an administrator, under the statute of 1857, allowing that court to dispense with an advertisement of the sale in a newspaper (Sess. Acts 1857, p. 26), raises the presumption that such advertisement was in fact dispensed with.
3. *Mortgage — Sale under during session of County Court — Purchaser at — Ejectment — Color of title — Defense of.*—A sale on a judgment of foreclosure by the Circuit Court cannot be made during a session of the County Court, and, if so made, would be void. But a purchaser at such sale would nevertheless hold under color of title, and may, in suit in ejectment brought against him, set up the forfeited mortgage to protect his possession against all except the mortgagee and those claiming under him on a regular foreclosure sale.

Error to Lincoln Circuit Court.

Dyer, Fagg & McKee, for plaintiff in error.

A. H. Buckner, for defendants in error.

ADAMS, Judge, delivered the opinion of the court.

The following statement made by the defendant in error, and concurred in by the plaintiff in error, forms the basis of this opinion, to-wit: "The plaintiff instituted his action of ejectment against the respondents, claiming to hold the legal title to the premises in dispute by virtue of a deed from the administrator of David Bailey, deceased, under whom the respondents also claimed title. The deed of the administrator of Bailey to plaintiff was executed on the 12th of May, 1864, and the sale was made at the February term, 1864, of the Lincoln County Court. It appeared from the report of sale that the advertisement of sale was made by printed handbills, and not by publication in a newspaper. The report of sale was approved by the Probate Court, and a deed ordered to be made to plaintiff. The defendants relied upon a

mortgage executed by Bailey to the county of Lincoln, for the use of the school fund, executed February 11, 1863, and authorizing the sheriff of the county, without any suit on the mortgage, to sell the real estate mortgaged to satisfy the principal and interest, and to make an absolute conveyance in fee to the purchaser in case of default by the mortgagor; also an order of the Lincoln County Court directing the sheriff to sell the mortgaged premises; and also the deed of the sheriff of Lincoln county, dated September 23, 1864, referring to the order of the County Court and conveying the premises to the grantor of defendants. The sale thus made by the sheriff was made during the session of the County Court, and for this reason its introduction was objected to by plaintiff, but the objection was overruled. The defendants, in order to invalidate the title of plaintiff, read the appraisement of the real estate, as well as the petition for and report of the sale thereof, to show that the sale of Bailey's equity was neither petitioned for by the administrator nor appraised, but that the existence of the mortgage upon the real estate was ignored by the administrator, by the appraisers, and by the Probate Court in its order of sale.

The court decided that the paper title of defendants was a better title than the paper title of the plaintiff, and that plaintiff could not recover.

The defendants asked and the court gave the following declarations of law, against the objection of plaintiff:

"1. If the plaintiff purchased at the sale of the real estate of David Bailey, deceased, by his administrator, the right and title of said Bailey at the time of his death, in the real estate in controversy; and if, at the time of said sale, the mortgage to the county of Lincoln was in full force, unsatisfied and not foreclosed, the plaintiff only acquired the equity of redemption of said deceased Bailey in said real estate, and he cannot recover in this action.

"2. If the county of Lincoln held a mortgage on the real estate in controversy at the time of the sale by Bailey's administrator to the plaintiff, and the application for the sale of the real estate was made without any reference to the mortgage or statement of the interest of deceased in said real estate, but said order

of sale was made under the general powers of the Probate Court to sell real estate for the payment of debts, said sale of said real estate was absolutely null and void, and no title passed to plaintiff.

"3. The mortgage of David Bailey to Lincoln county and the order of the Lincoln County Court in reference thereto, in evidence, gave full and ample authority to the sheriff to sell the real estate in controversy, and if he sold the same to one Gordon for a *bona fide* consideration at a public and fair sale before the court-house door, and executed a deed to the purchaser thereof, said deed is sufficient to convey all the title thereto, notwithstanding said sale was made during a term of the County Court of Lincoln county.

"4. If the sale by the administrator of Bailey to the plaintiff was not advertised for four weeks in some newspaper published in this State, but by only ten handbills, then said sale was not according to law in such cases provided, and no title passed to the plaintiff by his purchase at such sale.

"5. The equity of redemption of David Bailey in the land in controversy could not be sold except by a special order of the County Court to that effect, and if the sale to the plaintiff was under a general order of the Probate Court to sell the same for the payment of the debts of deceased, the sale thereof is null and void."

The plaintiff asked no instructions, and the court gave judgment for defendants, and the plaintiff brings the case to this court by writ of error, after filing his motion for a new trial and the overruling of the same by the court.

From this statement it appears that both parties claim title under David Bailey, the plaintiff by virtue of an administrator's sale made under an order of the County Court for payment of debts, and the defendants under a mortgage made by Bailey to the county of Lincoln to secure a loan of school funds.

The court decided that the administrator's sale was void on two grounds: first, that it was a sale of an equity of redemption which could only be made by a special order for that purpose; and, secondly, that the sale was not advertised in a newspaper. In my judgment the court erred on both points. Under our administra-

tion law as it stood when this sale was made, and as it still exists, the County Court had the power to order lands to be sold for the purpose of redeeming mortgages on other lands, or the court might make a special order to sell the equity of redemption of the mortgaged premises. But the court also had the power, on the application of the administrator or a creditor of the estate, to make a general order for the sale of the real estate for the payment of debts, embracing equities of redemption and all other interests in lands.

The fact that some of the lands may be covered by mortgages does not exempt them from the order, and forms no impediment to the sale, whether the sale be ordered under one provision or another of the statute. The subsequent proceedings by the administrator in having them appraised, advertised, etc., are precisely the same. There is no force in the objection that an equity of redemption cannot be appraised. The appraisement would be the value of the land after deducting the mortgage. When land is covered by a mortgage of record, whether the appraisement be right or not, the purchaser only takes the equity of redemption, as that is the only interest subject to sale. If the mortgage debt has been allowed and classed it will be entitled to its share of the general assets, and if it should thus be paid off, the interest in the land covered by the mortgage will revert to the estate. (See opinion on motion for rehearing in Welton v. Hall, 50 Mo. 296.)

The judgment of the County Court, approving the report of sale, cured the defect, if any, in the advertisement. That was a final judgment from which an appeal might have been taken, and it could not be impeached in a collateral proceeding like this. But the statute of 1857 (Sess. Acts 1857, p. 26) allowed the County Court to dispense with the newspaper or handbill advertisements, and the presumption is, from the approval of the sale, that this was done.

The law in regard to foreclosing mortgages given for school moneys requires an order of sale to be made by the County Court, and such order has the same force and must be carried out by the sheriff in like manner as a *fieri facias* on a judgment of foreclosure by the Circuit Court. (R. C. 1855, p. 1425, § 30.) A

sale on a judgment of foreclosure by the Circuit Court cannot be made during the session of a County Court, and if so made it would be void.

But if it be conceded that the sale and deed of the sheriff for the mortgaged premises was void, such proceeding nevertheless constituted color of title, under which the defendant claims the possession of the land in controversy; he cannot, therefore, be looked upon as a mere stranger to the mortgage, or a trespasser in the sense that he cannot set up the forfeited mortgage to protect his possession.

A plaintiff in ejectment can recover only on the strength of his legal title. His chain of title must be perfect to authorize a recovery. The defendant in possession occupies a different position. In most instances he may protect himself by an outstanding title. If, however, he is a mere stranger to a mortgagee, or a trespasser without color of title, he ought not to be allowed to set up a forfeited mortgage to prevent a recovery by the mortgagor or the person holding the equity of redemption. (See Woods v. Hildebrand, 46 Mo. 284.) That was not the position of this defendant. He went into possession, it is true, under a void sale, but claiming the land under this color of title, and under the circumstances he must be allowed to protect his possession against all others except the mortgagee and those claiming under him, on a regular foreclosure sale. (McCormick v. Fitzsimmons, 39 Mo. 34; Johnson v. Huston, 47 Mo. 227; Howard v. Thornton, 50 Mo. 291.)

Under the view we take of this case, although errors were committed by the Circuit Court, its judgment was for the right party.

Judgment affirmed. Judge Wagner concurs. Judge Bliss absent.

DUNKLIN COUNTY, Plaintiff in Error, *v.* HENRY E. CLARK *et al.*, Defendants in Error.

1. *Demurrer — Answer waives, when — Withdrawal of answer by subsequent demurrer.* — If a demurrer be filed and not disposed of, and an answer is afterwards filed and the case tried on the answer, the demurrer is thereby waived. And where an answer is filed and afterwards the case goes off on demurrer without noticing the answer, the proceedings on the demurrer amount to a withdrawal of the answer.
2. *Practice, civil — Cloud on title — Conveyance of land by defendant — Demurrer.* — To constitute a cloud upon the title to lands, some color of title must be shown in defendant. And a petition praying that a cloud be removed from the title to certain lands, which states merely that defendant had conveyed away the lands, but contains no averment that defendant had any title in them to convey, is bad on demurrer.

Error to Cape Girardeau Circuit Court.

S. M. Chapman, for plaintiff in error.

Louis Houck, for defendants in error.

ADAMS, Judge, delivered the opinion of the court.

This action was commenced in the Dunklin Circuit Court, and taken by change of venue to the Cape Girardeau Circuit Court on the application of the defendant Clark. The plaintiff for the first time objects in this court that the application ought to have been made by all the defendants.

If the other defendants are satisfied, it does not lie with the plaintiff to make this objection. Whether the other defendants are satisfied or not, or could raise such an objection at all, need not be inquired into now.

Another point made here is that the notice of this application was not properly served. But this point was not presented to the Circuit Court, and cannot be considered here.

The next point is that the court exercised its discretion unsoundly in sending the case to Cape Girardeau, and the ground taken is that it was inconvenient for the plaintiff's attorney to attend that court. Courts are not bound to consult the conven-

ience of attorneys in making changes of venue. The court must send the case to some county where the causes complained of do not exist as convenient as may be to the opposite party. We do not see that the court exercised its discretion unsoundly in sending this case to Cape Girardeau.

There seems to be some confusion in this record, which, however, does not vitiate the final action of the court. The plaintiff amended his petition several times, and the defendant Clark filed an answer which was struck out, and then this order striking out was rescinded and the answer was left standing to the petition.

The defendant also demurred to each petition, and the demurrers were sustained and leave given to amend till a third amended petition was filed, which was also demurred to and final judgment given on this demurrer in favor of the defendants.

If a demurrer be filed and not disposed of, and an answer is afterwards filed and the case is tried on the answer, that amounts to a waiver of the demurrer. And in like manner, where an answer is filed and afterwards the case goes off on demurrer without noticing the answer, the proceedings on the demurrer amount to a withdrawal of the answer.

The only material point in this record is whether the demurrer to the last amended petition was properly sustained.

There are two separate counts in the petition; the first count alleges that Dunklin county is the owner in fee of several thousand acres of land, describing the land. The petition then charges that the defendant Clark, confederating with the other defendants in order to cheat and defraud the plaintiff out of said lands, procured one Absalom Farris to execute to the defendant Clark a deed of conveyance of these lands as president of the Dunklin and Pemiscot Plank Road Company, by which a cloud was cast over the plaintiff's title to these lands so as to render them less valuable and less salable, etc. There is nothing in the petition to show that the Dunklin and Pemiscot Plank Road Company had any color of title whatever to these lands, nor are they made parties to this suit. The prayer of the first count is that this cloud be removed and the title adjudged to plaintiff, etc.

The second count alleges that the plaintiff is owner in fee of a great many other tracts of land, describing them by their numbers as known on the United States surveys. The second count then charges that the defendant Clark procured blank certificates of purchase and filled them up without any authority; that those certificates are not genuine, but forgeries; that defendant Clark made conveyances of some of these lands to the other defendants, and asks that all conveyances, mortgages and deeds of trust for these lands be canceled.

The petition does not state to whom such deeds of trust and mortgages were made, but prays judgment that the cloud be removed and the title decreed to plaintiff, and for damages.

The demurrer sets forth several grounds, but I shall only notice two. The first is that the petition does not state facts sufficient to constitute a cause of action, and the second alleges that there is a defect of parties defendant.

The first cause of demurrer applies with peculiar force to the first count of the petition. To constitute a cloud upon the title of lands, there must be some color of title shown in the defendant. The conveyance of land by the grantor who sets up no title whatever does not cast any cloud over the title of the true owner. There is no pretense in this case that the Dunklin and Pemiscot Plank Road Company had any color of title to the land in dispute — at least nothing of the kind is alleged in the petition. The demurrer to the first count was properly sustained on this ground.

The second count is manifestly defective for want of parties against whom a decree is asked.

The court is asked to set aside mortgages and deeds of trust without bringing the parties to these mortgages and deeds of trust before the court.

Let the judgment be affirmed. The other judges concur.

BENJAMIN F. McPIKE *et al.*, Appellants, *v.* REUBEN C. PEN, SHERIFF, ETC., *et al.*, Respondents.

1. *Injunction — Sale of land — Cloud on title.* — The sheriff will be enjoined from the sale of land for non-payment of taxes, although the assessment be illegal, where a cloud will thereby be thrown upon the title. (Leslie v. St. Louis, 47 Mo. 474.)
2. *Railroad, subscription by county for — Notice — Injunction, etc.* — Where, under the act of March 15, 1870 (Wagn. Stat., 2d ed., 321 *a*), a County Court ordered a special election to vote on a proposition to subscribe to the capital stock of a railroad, but no sufficient notice was given of the election; *Held:*

   1. That an assessment against the landholders of the county, to meet the subscription ordered by the vote, would be unauthorized by law.

   2. That if the assessment had been warranted by law, the sheriff could not collect it under that statute by levy upon and sale of real estate; and that injunction would lie to restrain the officer from making such sale.

Appeal from Pike Circuit Court.

Fagg & Dyer, for appellants.

Caldwell & Biggs, for respondents.

BLISS, Judge, delivered the opinion of the court.

In pursuance of the provisions of the act of March 15, 1870 (Wagn. Stat. 2d ed., 321 *a*), the County Court of Pike County directed a special election to be held in the township of Ashley, upon a proposition to subscribe $8,000 to the capital stock of the La. & M. Plank or Macadamized Road Company, and after the election appointed a special commission to subscribe for the stock, and assessed a special tax to pay for the same. The sheriff, as tax collector, has made a levy upon the real estate of the plaintiff to pay the amount assessed against his property, and this is a proceeding to enjoin him from selling the same.

The question first arises whether injunction will lie, as the defendant objects to the remedy as now sought, and cites Drake v. Jones, 27 Mo. 428, and Kuhn v. McNeil, 47 Mo. 389. In these cases it was held that a sheriff will not be enjoined from selling lands upon common execution; but the court has uniformly enjoined the sale of lands for the payment of taxes, upon the ground that a cloud is thereby cast upon the title, although

the assessment was illegal. (Lockwood v. St. Louis, 24 Mo. 20; Fowler v. St. Joseph, 37 Mo. 228; Leslie v. St. Louis, 47 Mo. 474.)

The plaintiff bases his equity upon the grounds: first, that the proceedings under which the stock was subscribed were so irregular as to vitiate the assessment of the tax; and, secondly, that the collector had no right to collect it by levy upon real estate.

1. I will only consider one of the irregularities complained of, which is that the order for the special election made by the County Court provided for no notice of the election, and that no sufficient notice was in fact given. The statute provides that, upon the proper petition, it shall be the duty of the County Court to "order an election to be held in such townships," etc., "to determine if such subscription or appropriation shall be made, which election shall be conducted and returns made in accordance with the general election law." Nothing is said in relation to the notice, but we cannot hence infer that no notice is necessary. I cannot conceive of an election, at least unless it is fixed by law, without notice to the electors both of the time and manner in regard to which they are called upon to vote. And although the act is silent upon this subject, we must assume either that the obligation to direct a proper notice is implied in the authority to order an election, or that the notice must be given as required in the general election law. It does not become necessary to say which would be the proper mode, inasmuch as neither was adopted, and the notice actually given was a volunteer one and very imperfect at that. The election in this regard was irregular, and the necessity that notice be given is so controlling—it is such an essential part in the machinery of an election—that I cannot but regard the irregularity as fatal. The notice as actually given cannot help the matter. Two written bills, unsigned by any one, were posted up in a public place in the township. But they were not put up by any legal authority, and could have no legal force or effect. The law by plain implication provides for notice in one of the two ways I have indicated, and a volunteer one will not meet its requirements.

2. If the assessment had been warranted by law, the sheriff

cannot collect it by levy upon and sale of real estate. The act under consideration provides for no special mode of collecting the taxes rendered necessary by the subscription, but requires that "the County Court shall from time to time levy and cause to be collected in the same manner as county taxes, a special tax, which shall be levied on all the real and personal property lying and being within such township." We have then only to inquire how county taxes were then collected. It should be borne in mind that the power to collect taxes is purely statutory, and that the collector can take no step which is not provided for by the statute; hence, unless he was authorized to seize and sell real estate for the collection of county taxes, his present proceeding is unwarranted by law. Section 120 of the revenue act of March, 1872, has the same provision in regard to the collection of taxes by seizure of goods and chattels as was contained in preceding acts, but it nowhere provides for the seizure of real estate. The latter may be sold, but only for the taxes specifically assessed against it, and then not by levy and sale as upon ordinary execution, but in the mode pointed out by the act. So, then, the sheriff had no right to make the levy complained of in the case at bar.

The Circuit Court dissolved the injunction, and its judgment is reversed and the injunction made perpetual. The other judges concur.

EMMA T. WETHERALL *et al.*, Appellants, *v.* FANNY HARRIS, Respondent.

1. *Practice — New trial, motion for — Bill of exceptions.* — Errors committed at the trial will not be examined into unless there was a motion for a new trial.
2. *Wills, statute of — Failure to mention children in will, effect of.* — Under the statute (Wagn. Stat. 1365, § 9) where the children of the testator are neither expressly named in the will, nor so alluded as to show affirmatively that they were in his mind when making it, the presumption is conclusive that they were forgotten.

Per ADAMS, Judge, concurring.

3. *Practice act — Wills, statute of — Bill of exceptions — New trial, motion for.* — The proceeding under the statute of wills is summary, and the practice act does not apply; and no motion for a new trial is necessary.

Appeal from Pike Circuit Court.

Henderson & Hayden, for appellants.

No formal motion for new trial was necessary. There was but one point in the case, and exceptions were saved to the ruling of the court below. (Fine v. Rogers, 15 Mo. 315; Wagner v. Jacoby, 26 Mo. 532; Prince v. Cole, 28 Mo. 486; Gray v. Heslep, 33 Mo. 238.)

Murray & Robinson, with whom was *Thos. J. Fagg*, for respondent.

This court will not consider any errors alleged in a bill of exceptions outside of the record proper, when no motion for a new trial has been made. (The State v. Marshall, 36 Mo. 400; Hoppe v. Stone, 39 Mo. 378; Banks v. Lades, *id.* 406; Bishop v. Ranson, *id.* 416; Long v. Towl, 41 Mo. 398; Morgner v. Kister, 42 Mo. 466; Collins v. Sanders, 46 Mo. 389; Beatty v. Furnald, 47 Mo. 348.)

The presumption that the omission was unintentional may be rebutted when the tenor of the will, or any part of it, indicates that the child was not forgotten. (Block *et al.* v. Block *et al.*, 3 Mo. 407; Guitar v. Gordon, 17 Mo. 408; Beck v. Metz, 25 Mo. 70; Hockensmith v. Slusher *et al.*, 26 Mo. 237; McCourtney v. Mathes, 47 Mo. 533.) And in other States, where a statute similar to our own is in force, the same construction has been put upon it by the decisions of their courts. (Terry *et al.* v. Foster *et al.*, 1 Mass. 146; Wilde v. Breeder, 2 Mass. 569; Church v. Crocker, 3 Mass. 17; Wilder v. Goss, 14 Mass. 357; Wilson's Ex'r v. Foskett, 6 Metc. 400; Merrill & Wife v. Sanborn, 2 N. H. 499.)

Bliss, Judge, delivered the opinion of the court.

The plaintiff, Emma T., was the daughter of Wm. A. Harris, deceased, who made a will, giving all his property to his widow, the defendant, making no provision, as is alleged, for his said daughter. She and her husband present their petition, setting

out the real estate of deceased, describing the will, and ask that defendant be adjudged to deliver her the portion of the estate she would be entitled to had her father died intestate. Upon the trial the court gave judgment for defendant, construing the will as having in effect named or made provision for the said Emma T. A bill of exceptions was filed showing such construction, but there was no motion for a new trial. We must, then, first find whether we can consider anything in the bill of exceptions without such motion, and, if not, whether the record proper so sets out the facts as to bring the main question before us.

After the passage of the practice act of 1849, and so long as it was in force, it was uniformly held that the motion for a new trial, specifying the grounds for the same, was dispensed with; but in The State v. Marshall, 36 Mo. 400, this court held that the practice act of 1855 so far restored the old practice as to require a motion, and this view has since been uniformly adhered to. So a motion is necessary to enable us to examine into the errors that were committed at the trial; but if the pleadings and judgment sufficiently show the language of the will, we may review the construction given it by the court, and, if erroneous, the judgment cannot be sustained.

The petition shows the relationship of the said Emma T. to the deceased, describes the property, charges that he made a will and "bequeathed and devised to the said Fanny Harris, wife of said William A., all his property, real, personal and mixed, absolutely," etc.; also, that he "omitted in said will to mention the name of his said daughter Emma T., and failed to make any provisions for her; and that, by reason of said omission and failure, the said William A. died intestate as regards his said daughter."

The petition brought the case within the statute, and, if true, entitled the plaintiffs to relief. The answer admits the relationship and marriage of plaintiffs, the execution and probate of the will, and avers "that by said will the decedent bequeathed and devised all his property, real, personal and mixed, absolutely to the defendant, Fanny Harris, appointing her sole executrix of his

said will. But the defendant denies that the said decedent, William A. Harris, died intestate as to the said Emma T. Wetherall, but avers that he died testate as to her and all of his children; that in mentioning his minor children as the objects of his care, he excluded his other children then grown; and that the said Emma T. Wetherall, as well as all other children then grown, and who had been raised and educated by him, were by said will intentionally excluded, and not accidentally omitted."

The allegation of the petition, that the testator did not name his daughter, and that he failed to make any provision for her, is not denied by the answer. The legal consequence of not being named is denied, and it would seem from the answer that some allusion was made by the testator to minor children, from which the pleader infers that he excluded his other children, and that they were intentionally excluded, and not accidentally omitted. The material facts are not denied and are thus admitted, and no new facts are so set out as to show the court that the defendant's inferences were sound. And, indeed, enough appears to show that they were unsound; for the statute, and its universal construction, make the fact that children are not either expressly named, or so alluded to as to show affirmatively that they were in the testator's mind, conclusive evidence that they were forgotten, and that the testator unintentionally left them unprovided for. "The statute creates a presumption that they (children) were forgotten unless named or provided for." (Pounds v. Dale, 48 Mo. 270.) Hence the answer does not meet the petition, and was demurrable; nor can the verdict founded upon it sustain the judgment. This statute has so frequently received a construction by this court that it is quite unnecessary to say more.

That portion of the answer which shows the debts of the testator liquidated by defendant cannot go to the plaintiffs' right, but only to the amount to which they are entitled. The defendant should be credited with whatever she has expended on account of the estate, and must receive what she is entitled to as widow before the plaintiffs' share can be ascertained.

The other judges concurring, the judgment will be reversed and the cause remanded.

CONCURRING OPINION OF JUDGE ADAMS.

The remedy given to pretermitted heirs is a summary proceeding under the statute of wills, upon petition and due notice given to the legatees, devisees, heirs, executors and administrators. (See Wagn. Stat. 1370, § 47.) This restriction on the powers of testators was unknown to the common law, and it was eminently proper that the statute creating the restriction should also give the remedy. It is not an action in the legal acceptation of that term. (See Levins v. Stevens, 7 Mo. 90.) It is a statutory remedy by petition, more in the nature of a motion than an ordinary action at law or in equity, and the practice act and proceedings under it do not apply to this case. It is sufficient if the bill of exceptions shows the rulings of the court, and no motion for a new trial was necessary. The bill of exceptions contains a copy of the will, with the construction put on it by the Circuit Court, which, in my opinion, was erroneous.

Whether there be anything left for distribution after payment of debts, and whether the pretermitted parties had already been sufficiently advanced, are questions not properly before this court, and must depend for solution upon the evidence that may be adduced on the trial of the case.

On the grounds here stated, I concur in the result.

MOSES MARX, Defendant in Error, *v.* CHARLES J. FORE, Plaintiff in Error.

1. *Judgments, foreign — Jurisdiction — Want of service — Defenses in suit on such judgment.* — In suit brought upon the record of a judgment rendered in a sister State, defendant may set up in his answer as a defense the fact that in the original suit no service was had upon him, and that the appearance entered on his behalf was fraudulent, notwithstanding that such defense contradicts the recitals contained in that record. Such matter is proper under the statute law of this State, authorizing equitable defenses. But defendant must couple with such statement allegations showing that he has a good defense on the merits, and so has been injured by such fraudulent appearance. Otherwise there would be no warrant for equitable interference.

Per ADAMS, Judge.

2. *Judgments import verity — May be set aside, when.* — Judgments of courts of record, whether domestic or foreign, may be impeached and declared void for fraud in actions brought to enforce them in this State. At law, where there is no apparent irregularity, judgments import absolute verity; but in equity they may be set aside when obtained by undue and fraudulent contrivances, in the absence of and without notice to the opposite parties.

Per WAGNER, Judge, dissenting.

1. *Judgments of sister States — Suit upon — Notice, denial of — Plea of fraud, etc.* — In suit on a judgment obtained in another State, where the record avers the service of notice, defendant will not be permitted by his answer to deny it. Nor will he be permitted to set up the defense that the judgment was obtained by fraud.

Error to Cape Girardeau Court of Common Pleas.

J. B. Dennis, for plaintiff in error.

Fraud charged in general terms is a good defense, and it is error to exclude proof of it (Edgell v. Seigerson, 20 Mo. 494), more especially where, as in the case at bar, a replication had been filed to this count. But the error mainly relied on in this case as a ground for reversal, is the refusal of the court to hear parol proof denying service of process, and of the authority of any one to enter an appearance for defendant in the suit in Mississippi. To his counsel, plaintiff in error earnestly insists that he "knew nothing whatever of any suit pending against him in Mississippi;" "that he was never served with process in this suit," and that "the return of the officer, and pretended appear ance of some one for him, is a base fraud."

The act of Congress of May 26, 1790, chapter 11, provides that "the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court in the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." And the question presented by this record is, are the recitals which a record contains conclusive of its jurisdiction, and may it be controverted by extrinsic evidence? The constitution says that Congress may prescribe the "effect" of records, etc., from other States. "The effect of records must in its

very nature apply to them as evidence, because no one will contend that an execution would issue on the record alone." At common law a domestic record imports absolute verity, but during the last century a very different rule prevailed as to foreign records, etc., under which rule, if a party recovered judgment in one State or country, he might be put to the risk and delay of trying the case over again in another country; and it was to remedy this evil that the clause above cited was ingrafted in our constitution.

In the case of Monroe v. Douglas, 4 Sandf. Ch. 126, 181, the court held that a foreign judgment was conclusive as a defense, but only affords a presumption when made the foundation of a suit. It is true that the English courts now hold that a foreign judgment rendered on due notice, and by a competent tribunal, is equally as conclusive, whether it was for plaintiff or defendant, but such was not the rule when this constitutional amendment was adopted. The constitution only had reference to such judgments as are valid, not to those which are void. "It did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory." (Sto. Confl. Laws, 7th ed., 609; Sto. Com. Const., § 183; McElmoyle v. Cohen, 13 Pet. 312.) It is a well-settled rule that an *ex parte* judgment from another State is void in this State. (Gillet v. Camp, 23 Mo. 375; Winston v. Taylor, 28 Mo. 82; Latimer v. Union Pacific R.R. Co., 43 Mo. 105.)

In regard to the question at bar, there are but three cases directly in point in this State. In Wilson v. Jackson's Adm'r, 10 Mo. 329, this court held that a judgment of a sister State is *prima facie* evidence of the jurisdiction of the person, where the writs were returned "executed," although such return is informal. In Warren & Dalton v. Lusk, 16 Mo. 102, Judge Scott bases his decision on the case of Mills v. Duryee, 7 Cranch, 481, It is submitted that the case cited by his honor did not decide that point. (See opinion itself by Judge Story; dissenting opinion by Justice Johnson; Hare & Wallace Am. Lead. Cas. 620; Sto. Confl. Laws, 7th ed., § 609 *et seq.*) On the contrary, the case of Starbuck v. Murray, 5 Wend. 148, was cited and relied on as

an authoritative exposition of the law by the Supreme Court in the case of Harris v. Hardeman, 14 How. 336, 340. Same in Noyes v. Butler, 6 Barb. 613; Wilson v. Bank, etc., 6 Leigh, 570; Pollard v. Baldwin, 22 Iowa, 328. In Norwood v. Clarke, 24 Texas, 551, proof that the defendant was not served with process was in like manner held admissible, although the record set forth that service was effected. And the courts obviously inclined to this opinion in the cases of Rape v. Heaton, 9 Wis. 328; Rogers v. Gwin, 21 Iowa, 58; Gleason v. Dodd, 4 Metc. 133. In the case of Barney v. White, 46 Mo. 137, this court seems to incline to the same opinion. The weight of authority sustains the affirmative of the proposition that "parol testimony may be admitted to deny jurisdiction." (Hare & Wallace's Am. Lead. Cas. 642, 646, citing Cait v. Haven, 30 Conn. 190, 198.) The reason assigned by Judge Marcy in the Starbuck-Murray case, as to why parol proof should be admitted, has never been refuted; and if a contrary rule is to prevail in this case, it seems to me to be little less than a premium offered to fraud. It is submitted that if the views here advanced are sustained, and Marx cannot recover on his judgment for want of notice, it will not bar his right of recovery on the original contract. (Sto. Confl. Laws, 7th ed., 609 *b.*)

G. H. Green and *Louis Houck*, for defendant in error.

I. The record of the Copiah Circuit Court shows an appearance of the defendant by attorney. The defendant cannot contradict that record by parol as to that point, in a suit upon the judgment in this State. Where the record of a judgment recorded in another State shows that the defendant voluntarily entered his appearance by attorney, he will not be permitted, in a suit upon the judgment, to disprove the authority of the attorney. (Warren v. Lusk, 16 Mo. 102; Baker v. Stonebreaker, 34 Mo. 172.)

II. The matter stricken out and the evidence excluded were properly stricken out and excluded. It was an attempt to inquire into the merits of the case. Whatever constitutes a defense to the action ought to have been pleaded in the Copiah Circuit Court. (Destrahan v. Scudder, 11 Mo. 484; Grover v. Grover, 30 Mo.

400; Sto. Confl. Laws, § 600; Sto. Const., § 183; Mills v. Duryee, 7 Cranch, 481, where it is expressly held that the merits of the judgment cannot be investigated. (Harrington v. Cornel, 3 Wheat. 234; Christmas v. Russell, 5 Wall. 290; Sweet v. Barckley, 53 Me. 346; McFarland v. White, 13 La. Ann. 394; Milne v. Van Buskirk, 9 Iowa, 558; Benton v. Burgot, 10 Serg. & R. 240.)

BLISS, Judge, delivered the opinion of the court.

This was a suit upon the record of a judgment rendered in Mississippi, and though many questions are raised, I will consider but one. For one of his defenses the defendant set forth the alleged indebtedness for which the judgment was rendered, charged that it was paid off and discharged before the suit was instituted; that he had left Mississippi and was not a resident of that State when it was instituted; that no service of process was had upon him; that he did not know of the suit and never authorized any one to appear to it for him. The Mississippi record shows appearance by attorney and plea, and that part of the answer setting forth the above facts was, on motion of plaintiff, stricken out. The present record shows that it was not stricken out for defect or informality, but upon the ground that the judgment could not be thus impeached.

Counsel have discussed the vexed question whether this Mississippi record imported absolute verity, so that the recital of service and defendant's appearance could not be contradicted, and have cited authorities upon both sides. The affirmative of this question was taken by this court in Warren v. Lusk, 16 Mo. 102, and if the language of Judge Scott is to be taken literally, a judgment, though rendered without appearance in fact or notice to defendant, must be paid by him, or he must go to the State where it was rendered—perhaps to Oregon or Maine—and move to set it aside.

But we are not to understand the language of the court as shutting off equitable defenses. That question was not before it, and when the judge says that recitals import absolute verity, and that defendant is estopped from disputing them, he only means

that the judgment is to have the force of a domestic one, which must be attacked by a direct proceeding.

That a judgment may be impeached for fraud or mistake cannot be questioned. (Rogers v. Gwinn, 21 Iowa, 58; Pierce v. Olney, 20 Conn. 544; Christmas v. Russell, 5 Wall. 270.) If it be a domestic one, a motion, if made in season, will reach it, and is a proper remedy. (Downing v. Still, 43 Mo. 309.) It may also be set aside by error or bill. "Courts are in the constant habit of relieving parties upon equitable terms from judgments rendered against them in consequence of the fraudulent acts of the successful party or his attorney" (Rogers v. Gwinn, *supra*); and what greater fraud than falsely to enter an appearance in order to obtain jurisdiction over a defendant?

The only question, then, is, whether the judgment may be attacked, and the want of jurisdiction and the fraudulent simulated appearance be shown by answer, or whether the party, who is not supposed to know of its existence until sued upon it, shall be compelled to go to the State where it was rendered, and there proceed directly to overthrow it. I infer that the latter will not be required, from several considerations. First, the suit is upon a judgment. If obtained by fraud and without jurisdiction, it is no judgment — is void, and will be so declared if the fact is made to appear; the defense goes to its very existence. Second, citizens are not driven to foreign States to protect their rights. If they have a legal right, or are being subjected to a wrong, they may look for protection to the tribunal having jurisdiction over them and the subject-matter, if the opposite party has placed himself within this jurisdiction. Third, it would, in many cases, be oppression or an absolute denial of justice. The inconvenience and expense of going to a distant State, of there employing counsel and litigating the matter, would often be so great that the suffering party would rather pay a pretty large judgment, although fraudulently obtained, than to undertake to set it aside. And besides, he might not succeed in his direct proceeding abroad until long after it had been collected at home. Fourth, the statute expressly authorizes equitable defenses, and provides for affirmative relief, where, under the old system, a bill was necessary under

which a suit in chancery was instituted. Now, if the subject-matter of the bill shows a defense to a pending suit, it may be set out as a defense by way of answer.

The error of the court below was in striking out a defense of this character. It did not distinguish between the old plea in bar and the setting forth of facts which in equity should destroy the judgment. We may adhere to Warren v. Lusk, and still permit a party to allege and show that the judgment was obtained by such fraud as went to the jurisdiction of the court, and to do this we will not compel him to go to the *situs* of a foreign judgment, but permit him to make it as a defense whenever and wherever such judgment is sought to be enforced. I say nothing of any other fraud except that which would go to the jurisdiction. If that was obtained, the party may be required to attack the judgment where rendered. But in this view it would not be sufficient to simply set out the fraudulent appearance, but he must show that he was injured by it; for if he has no defense to the claim, there is no warrant for equitable interference. In the case at bar he has done both, and if the facts set forth in the answer which was stricken out are true, the plaintiff is not entitled to judgment.

I have said nothing to impugn the authority of Warren v. Lusk in a proper case. But if it is considered to warrant the action of the court below in the case at bar, it so far goes beyond the received interpretation of the constitutional provisions requiring credit to be given to the judgments of other States. The rule is that they are to be just as conclusive as domestic judgments, *with this exception*, that "they are open to inquiry as to the jurisdiction and notice to defendant" (Christmas v. Russell, 5 Hall, 305), and this inquiry can be made notwithstanding the recitals. (Harris v. Hardman, 14 How., U. S., 334, quoting and approving the emphatic language of Marcy, Justice, in Starbuck v. Murray, 5 Wend. 156; Kerr v. Kerr, 41 N. Y. 272; Rape v. Heaton, 9 Wis. 328; Pollard v. Baldwin, 22 Iowa, 328.)

The reasoning of Marcy in Starbuck v. Murray, as quoted and approved in Harris v. Hardman, is unanswerable. After citing many authorities he says: "This doctrine does not depend merely upon adjudged cases. It has a better foundation; it rests upon

a principle of natural justice. No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence without the privilege of showing if he can the claim against him to be unfounded.

"But it is contended that if the other matter may be pleaded by defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore that the supposed record is in truth no record. If the defendant did not have proper notice of and did not appear to the original action, all the State courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrovertible verity of the record, he is deprived of his defense by a process of reasoning that to my mind is little less than sophistry. The plaintiffs in effect declare to the defendant the paper declared on is a record because it says you appeared, and you appeared because the paper is a record."

Reliance is had, in favor of the doctrine of absolute verity, upon Mills v. Duryee, 7 Cranch, 418; but that case has not been generally followed, at least in the sense now sought to be given it. A party about to perpetrate a fraud by obtaining judgment against one without his knowledge, would of course see that the record showed an appearance, and to estop the latter from showing the record to be a nullity would offer a bounty to such frauds. Counsel rely upon Christmas v. Russell, 5 Wallace, but the question could not arise in that case, inasmuch as the party had appeared and made defense, and upon other questions the record was conclusive.

Judge Adams concurring, the judgment will be reversed and the cause remanded.

SEPARATE OPINION OF JUDGE ADAMS.

The general allegation that the judgment was fraudulently

obtained, taken in connection with the specific charges of the total want of notice and the fraudulent entry of the defendant's appearance by an attorney not appointed by him, together with the facts alleged in regard to payment, must be looked to as constituting a good equitable defense to this action. Without impugning the doctrine laid down by the Supreme Court of the United States in Mills v. Duryee, 7 Cranch, 481, and afterwards affirmed by this court in several cases, I maintain that judgments of courts of record, whether foreign or domestic, may be impeached and declared void for fraud in actions brought to enforce them in this State. It is the peculiar province of courts of equity to ferret out all questions of fraud, and to set aside all transactions founded in fraud, whether they be the acts of parties *in pais*, or the solemn adjudications of courts.

It would be strange, indeed, if no redress could be afforded by our own courts against foreign judgments, or judgments of sister States obtained by fraud and imposition, and brought here to be enforced. It may be conceded that at law, where there is no apparent irregularity, such judgments import absolute verity; but in equity they may be set aside when obtained by undue and fraudulent contrivances, in the absence of and without notice to the opposite parties. Our citizens cannot be driven to a foreign court to seek a remedy against such judgments, but may, whenever an action is brought here, set up this equitable defense as a complete bar.

The case of Christmas v. Russell, 5 Wall. 290, is not in conflict with these views. The court admits in that case that judgment obtained by fraud may be impeached in a court of chancery by a direct proceeding for that purpose. Here our code of practice allows parties to set up equitable defenses by way of answer, and they may do so, and thus impeach judgments upon which they are sued, without resorting to an independent action in the nature of a bill in chancery for that purpose.

For these reasons I concur in the opinion of Judge Bliss.

DISSENTING OPINION OF JUDGE WAGNER.

The judgment which was given in evidence, and upon which

this suit was founded, stated clearly that the defendant was personally served with notice, and appeared and defended by attorney. The defenses that are now set up to that judgment resolve themselves into two points, namely: that the defendant was not served with process, and that the judgment was obtained by fraud. It may be here remarked that the plea of fraud was denied, and no evidence given or offered to show that any existed; unless the allegation that judgment was rendered without the service of process on defendant is to be construed into a fraudulent obtaining of it. That the Circuit Court of Mississippi, in which the judgment was rendered, was a court of competent jurisdiction, is not disputed. The question, then is, will the defendant be permitted to contradict the record and deny notice, when it is expressly averred therein that he had such? I had supposed that, since the decision in the case of Warren v. Lusk, 16 Mo. 102, the question was conclusively settled and at rest in this State. The profession have been of that opinion, and the subsequent cases have followed it. That was an action upon a judgment rendered in Illinois, and Lusk defended upon the ground that he was not served with original process in the cause and never appeared thereto, and did not authorize any attorney to appear in his behalf. The record stated that Lusk appeared by his attorney and filed a demurrer, which being afterwards withdrawn, a decree was rendered against him *pro confesso*.

There was no recital in the judgment that Lusk was served with process, but simply an appearance by attorney; and yet, after the most exhaustive argument by counsel, and mature deliberation by the court, it was held that, under the act of Congress, where it appeared from the face of the record that the defendant appeared by his attorney, evidence to show that the attorney had no authority to appear was not admissible. Here the case is stronger; the record avers the service of notice as well as an appearance by attorney, and if "full faith and credit" is to be given to it, I cannot easily see how a party can be allowed directly to deny it in the courts of this State. If its verity can be contradicted by a simple allegation of its falsity, it seems to me that the constitutional provision is destroyed. That there

are cases which allow such a line of defense, I am fully aware, but I think the rule adopted by this court in its previous decisions contains the true principle and should be adhered to.

Mr. Bigelow, in his recent treatise on estoppel, speaks of Warren v. Lusk as one of the cases in which the constitutional provision and act of Congress in relation to the judgments of sister States have been faithfully followed. (Bigel. Estop. 145.)

The jurisdiction of the court rendering the judgment may always be inquired into, and if no proper notice was served so as to subject the parties to the jurisdiction of the court, that will be a cause for impeaching the record.

Thus, in the case of D'Arcy v. Ketchum (11 How. U. S., 165), it appeared that a judgment had been rendered in the State of New York in favor of Ketchum against Gossip & D'Arcy, upon a partnership note of theirs. There was personal service on Gossip, and no service on D'Arcy, who was an inhabitant of Louisiana. Judgment was rendered against D'Arcy, in accordance with a New York statute, which provided that where joint debtors were sued, and one of them brought into court, judgment should go against the others in like manner as if they were served with process, the service of process on one being regarded as constructive service upon the rest. An action upon this judgment was brought in the Circuit Court of the United States against D'Arcy. The court held that under the act of May 26, 1790, the record was entitled to full faith and credit, and gave judgment accordingly. This judgment of the Circuit Court was reversed in the Supreme Court on appeal, where it was held that the courts of New York acquired no jurisdiction over D'Arcy, and that, not being a citizen or inhabitant of that State, he could not be affected by laws to which he was not amenable. But the record in that case did not show that any process had been served upon D'Arcy.

See also upon this subject Latimer v. The Union Pacific Railway (43 Mo. 105), where we held that a State, by its Legislature, could not grant jurisdiction to its courts over persons or property not within its territory.

But these were cases of constructive or simulated notice, and the impeachment of the judgments did not involve a contradiction of

the recitals or averments in the record. If the record states that personal process was had, it imports absolute verity, and it cannot be averred against.

This question was recently reviewed in the Supreme Court of the United States, and the authorities commented on. One of the defences set up to the judgment in controversy was that it was procured and obtained by fraud, but that defense was held bad. Fraud can be pleaded only where the merits of the action are open to controversy. And the court held unanimously that, subject to the qualification that they are open to inquiry as to the jurisdiction of the court which gave them and as to notice to the defendant, the judgment of a State court, not reversed by a superior court having jurisdiction, nor set aside by a direct proceeding in chancery, is conclusive in the courts of all the other States where the subject-matter of the controversy is the same. (Christmas v. Russell, 5 Wall. 290.)

The Supreme Court of the United States is the legitimate tribunal to definitely and finally construe the national constitution and the acts of Congress, and I am content to abide by its judgment. The established rule is that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and it can only be reversed, set aside or impeached by a proceeding in the jurisdiction where it was rendered. Strangers may show that it is fraudulent, but parties and privies are conclusively bound.

For the foregoing reasons I dissent from the conclusions arrived at by the majority of the court.

THE STATE OF MISSOURI, Plaintiff in Error, *v.* JOSEPH C. KILLIAN, Defendant in Error.

1. *Escheats, statute of—Alien enemy, etc.*—In an action under the statute of escheats (Wagn. Stat. 584) to have certain land declared the property of the State, where the petition avers that the last lawful owner became such in 1825 (see Rev. Laws of 1825, p. 35), and was, at the time of his death, an alien enemy, but contains no allegation that he had not declared his intention to become a citizen when he became the owner, and fails to aver that he had not devised the land at the time of his death—in such case the petition is bad for want of statement of a sufficient cause of action.

Error to Perry Circuit Court.

B. B. Cahoon, for plaintiff in error.

The information stated facts sufficient to show to the court that the lot had escheated to the State (Wagn. Stat. 584, § 1; *id.* 586, § 10), and upon the death of Bartholomew Murphy the title to the lot vested in the State. (Farrar v. Dean, 24 Mo. 16.)

Robinson & Clardy, with *J. C. Killian, in pro. per.*, for defendant in error.

It is true that the title to land vests in the State by escheat upon the death of the person last lawfully seized, upon the contingency mentioned in the statute (Wagn. Stat. 585, § I), without inquisition of office found. (Farrar v. Dean, 24 Mo. 16.) But when the State seeks to gain the possession of the property by information, it must aver and prove affirmatively the existence of each of the several conditions or material facts upon which the vestiture of title depends, to-wit: 1, that the person last lawfully seized died without devising the same; 2, that he died, leaving no heirs or representatives capable of inheriting the same; 3, or that the devisees thereof were incapable of holding the same; 4, that there is no owner of the real estate capable of holding the same; 5, that the same has not been sold according to law, within five years after the death of the person last lawfully seized, in payment of debts. (Wagn. Stat. 584, § 1; *id.* 586, § 10.)

ADAMS, Judge, delivered the opinion of the court.

This was a proceeding under the statute of escheats, to have a certain lot of ground in the town of Perryville, in Perry county, declared the property of the State.

The petition alleges that Bartholomew Murphy was the last person lawfully seized of said lot; that at the time of his death he was an alien, and left no heirs at his death; that he died about the year 1843; that defendant Killian claims said estate and is in possession by his tenant Grebe. There is no allegation in the petition that Murphy died without devising the lot in dispute.

The defendant denies all the material allegations of the petition and sets up a former adjudication which was had after the death of Murphy's wife, who was alleged to have been at that time the last person seized. The court declared that this former adjudication, to which the present defendant Killian was a party defendant, was a bar to this suit, and gave judgment for the defendant.

I am inclined to think, from the record in this case, that the former adjudication was a bar. But without examining this question minutely, I am of the opinion that the judgment in this case was for the right party in any aspect of the case.

The petition does not state facts sufficient to constitute a cause of action. Ever since 1825, and perhaps before that time, an alien might hold land in this State, and dispose of the same, who had declared his intention of becoming a citizen of the United States by taking the necessary oaths, etc. (See R. S. 1825, p. 128.) There is no allegation in the petition that Murphy had not declared his intention to become a citizen when he received the conveyance of the lot. Nor is there any allegation that he had not devised the lot at the time of his death (1843). It will be observed that he took the conveyance in 1828, and at this time, if he was capable of holding the lot—and we must presume he was, in the absence of an allegation to the contrary in the petition—it could not escheat to the State unless he died intestate as to the lot. (See R. S. 1825, p. 356.) No such allegation is made in the petition. Under the pleadings in this case I am satisfied the judgment was for the right party.

Judgment affirmed. Judge Wagner concurs. Judge Bliss absent.

THE STATE OF MISSOURI *ex rel.* JAMES K. ROBBINS, Respondent, *v.* THE COUNTY COURT OF NEW MADRID, Appellant.

1. *Swamp lands exempt from liability of county on ordinary indebtedness.*—The swamp lands donated to the State of Missouri, under the act of September 28, 1850, and donated to the several counties by that of March 27, 1868, are held for school purposes only (see act last named, § 8), and are exempt from any ordinary liability for county indebtedness.

PER CURIAM. WAGNER, J., dissenting.

2. *Constitution, section 27, article IV—Construction of—General and special laws—Legislature, discretion vested in.*—The act "to authorize the County Courts of Madison, Wayne and other counties to levy a special tax for the purpose of paying the debts of said counties," is not in conflict with section 27, article IV, of the State constitution, which provides that "the general assembly shall pass no special law for any case for which provision can be made by general law." The question whether any given case can be provided for by a general law, or whether a special law is necessary, is a question solely for the Legislature to settle, and cannot be determined by the Supreme Court. (See State ex rel., etc., v. Boone County Court, 50 Mo. 317.)

Appeal from New Madrid Circuit Court.

L. Houck, for appellant.

The act (see Sess. Acts 1868, p. 263) is unconstitutional. If section 27 of article IV of our constitution means anything, this act must fall. The words "the general assembly shall pass no special law for any case for which provision can be made by a general law, * * * for all cases where a general law can be made applicable," are clear and explicit. The act of 1868 relates to "particular localities," and because it applies to "certain specified" counties, is not "coextensive with the State," and its influence is not "felt in every county," according to the ruling of this court in The State *ex rel.* Dome *et al.* v. Wilcox, 45 Mo. 465, must be considered a special statute.

This court must know that a general law can be made applicable. (*Ex parte* Pritz, 9 Iowa, 33.) It is a proper subject of judicial inquiry. (Thomas v. The Board of Commissioners, 5 Porter, 4; Clark v. Irwin, 5 Nevada, 125; 33 N. Y. 447; Sedgw. Stat. and Const. Law, 62, 482–7.)

W. B. Napton, for respondent.

Section 27, article IV, of the constitution was not intended to exclude special enactments for municipal subdivisions of the State, having peculiar interests, or for localities needing legislation not required elsewhere. (State v. Squires, 26 Iowa, 340; Johnson v. R.R. Co., 23 Ill. 202; State v. Hitchcock, 1 Kan. 178; Gentile v. The State, 29 Ind. 409; Brooks v. Hyde, 37 Cal. 366;

State v. Parkman, 5 Nevada, 15; Clark v. Irvine, *id.* 125; State v. Ebal, 40 Mo. 190–91.) The circumstances existing in the counties named are not stated, and whether they existed elsewhere is not known. Respect for the Legislature requires us to presume that there were peculiarities in the financial condition of the counties named which did not exist in the other counties, and therefore such an act would either be inapplicable or improper for the whole State.

But apart from the act of 1868, it is not shown by the evidence that the taxation under the general law had been exhausted. The actual taxation for 1870 was only $3,716, whereas the value of the assessed taxable property of the county was $845.980. The order on the records for a levy of one per cent. was not executed, as one per cent. would be $8,459, nearly three times the actual taxation.

Bliss, Judge, delivered the opinion of the court.

The relator recovered judgment against the county of New Madrid for some $10,000, and sued out an alternative writ of *mandamus* showing the judgment, charging that he had applied to respondents to levy a tax to satisfy it, which they refused to do, and asking for a peremptory writ to compel them to provide by the necessary taxation for the means of satisfying the same. The answer set forth two reasons why the writ should not issue: 1st, that the county possessed a large amount of swamp lands, subject to sale upon execution, and therefore the relator had another remedy; 2d, that the County Court was only authorized by law to levy a tax for county purposes to the amount of one hundred per cent. over the amount of the State tax, and that before the service of the writ a levy had been made of that rate. That part of the answer embracing the first point was stricken out on motion, and to the other point the relator replied that by the act of March 13, 1868 (Sess. Acts 1868, p. 263), New Madrid and certain other counties were authorized to impose an additional tax for the purpose of paying their debts. A peremptory *mandamus* was awarded, and the respondents claim that the court committed error in striking out the first defense, and in holding

that they had the power to impose the tax authorized by the act of 1868. Upon the first point it is conceded that if the county has property subject to execution and sale upon the judgment, the present remedy should not be afforded, as it is one of those extraordinary ones only to be resorted to when others fail. Are, then, the swamp lands within the several counties subject to sale upon execution against the counties? The affirmative of this question is urged by counsel for the original respondents, for the reason that by the act of March 10, 1869 (Sess. Acts 1869, p. 66), a conveyance to the several counties of all the title and interest of the State in and to the swamp and overflowed lands was provided for. But this act does not specify the use for which the counties shall hold these lands, nor repeal any provision theretofore creating a use. It is perfectly consistent with any obligation that may have been or may be imposed upon the counties in regard to the disposition of the proceeds of the sale of these lands. It is true, if no disposition is provided for, they might belong to the general revenue and be used for any lawful purpose; and in that case they might or might not be directly liable to seizure for general debts of the county. Of this it is not necessary for us to speak, and for the reason that before the passage of the above mentioned act a specific use had been designated to which their proceeds should be devoted. The legislative intention in this matter is clear and unequivocal. The above act is not the one upon which the counties rely for title; it only specifies the mode of conveying the same. But the previous act of March 27, 1869 (Sess. Acts 1868, p. 68, § 1), expressly donates the swamp lands "to the counties in which they may be respectively situated," and says that they "shall be the absolute property of such counties *for the purposes hereinafter designated*." This purpose is designated in section 8, which provides that the "net proceeds of the sales of all such lands, after defraying the expenses of draining, reclaiming, surveying and selling the same, as herein provided, shall be paid into the county treasury and become a part of the public school fund of the county." The same use had been before established as to most of the counties by the act of March 3, 1851, page 238; so that the several counties, instead of hold-

ing these lands for general purposes, have received them from the State in trust, with power of disposition, and hold them for the use of the public schools. So, then, they must be held as declared by the statute, and entirely exempt from any liability for ordinary county indebtedness.

Secondly, the original respondents claim that no authority was given them by the act of March 13, 1868, above referred to, to impose the additional tax therein mentioned to pay the county debt, and for the reason that the act itself was unconstitutional, inasmuch as it violates the following provision of section 27, article IV: "The general assembly shall pass no special law for any case for which provision can be made by a general law," etc. In The State *ex rel.* Henderson v. The Judges of Boone County Court, 50 Mo. 317, this clause was considered, but as it does not clearly appear upon what principle the majority of the court agreed to the judgment in that case, this question may be considered still open. Upon one side it is claimed that the question whether a provision to reach the case can be made by a general law is a judicial one, upon which courts must act whenever in their opinion the Legislature has violated the provision; and upon the other hand it is contended that the question of the necessity for the local act must be passed upon by the Legislature, and that its decision cannot be reviewed.

It should be premised that every question of doubt should be resolved in favor of the validity of a legislative act, and, when the constitution restrains the exercise of legislative power, the restraint itself and the terms upon which it is imposed should be so construed as to sustain the power as exercised, unless such construction is clearly unconscionable. (Sedgw. Stat. and Const. Law, 482; Cooley Const. Lim. 182; 19 Pick. 95; 20 Wend. 599; 6 Cranch, 128.)

The section containing the above constitutional clause contains an express prohibition against legislation in regard to various matters, and it is not disputed that this prohibition is absolute, that the legislative body is without discretion as to those matters, and that the courts would refuse to give effect to any act which disregarded it. But the prohibition against special laws is not

general, but only against a class of them, and that class is not designated by their object or subject-matter, but embraces such cases as in the opinion of some person or body can be reached by general laws. Who is to decide what cases are included in this prohibited class? Clearly the Legislature; at least in the first instance. Whether the local object could be effected by a general act may be a matter of doubt. One legislative body might differ from another, and one court from another. It is not a question of law so much as a question of fact, and when a bill is introduced, for instance, to relieve a particular county under special circumstances, the Legislature must first decide whether they are entitled to the relief; and, second, as to the manner of giving it, which involves the consideration whether a general law will reach the case. A local law is considered necessary, and the act is passed. Where do we get appellate power in the case, the power to review legislative discretion — a discretion expressly required to be exercised by the legislative body? I cannot find it in the relation we hold to that body, and in the obligation we are under to resolve every doubt in favor of the legality of their acts. If it were intended to make the prohibition absolute as to certain acts, they would have been included in those expressly provided against. The constitutions of some of the States have increased the list of such prohibitions, and as to those included within it there is no doubt. The Legislature has no discretion, no outside question to decide or fact to ascertain, but is forbidden to meddle with the subject. But not so under the clause in question, and I am compelled, upon fresh examination, to concur in the views of Judge Adams upon the subject, as expressed in The State v. Boone County Court. I can find no other safe rule dividing the judicial from the legislative power.

I am aware that in our sister State of Iowa it is held otherwise, and I have a high respect for the opinion of its court. The first case was *Ex parte* Fritz, 9 Iowa, 33, and its doctrine upon this point has been followed in several subsequent cases. *Ex parte* Fritz was based, so far as authority is concerned, upon Thomas v. Board of Commissioners, 5 Ind. 4, a case since overruled in Gentile v. The State, 29 Ind. 409. The act of special legislation

under consideration in the Iowa case was expressly prohibited by another clause in the constitution of that State, although the court held that a prohibition was also implied by a clause similar to the one we are now considering. Neither the decision of that case nor of the ones that followed necessarily involved the opinion given by the court upon the latter clause.

The Supreme Court of Nevada, in Clarke v. Irwin, 5 Nevada, 124, says in a line that the court must inquire and decide the point, although the question was not necessarily involved, and that court also cited and relied upon the overruled case in 5 Indiana. I find no other case where the same view is held.

In Atkinson v. M. & C. R.R. Co., 15 Ohio St. 21, the prohibition against the legislative act declared unconstitutional was express and unconditional. There are, however, cases where conditional prohibitions are held to be addressed to the Legislature. In The People v. Lake County, 33 Cal. 487, it appeared that the constitution of the State had required the Legislature "to provide a system of county governments which shall be, as near as practicable, uniform throughout the State." Under it the forms of local government varied greatly in different counties, and the court threw the responsibility upon the Legislature and refused to interfere against the exercise of legislative discretion in the matter. The State v. Hitchcock, 1 Kan. 173, was cited by Judge Adams in The State v. Boone County Court, and is directly in point.

In Gentile v. The State, 29 Ind. 409, the Supreme Court of that State reviews the case in 5 Ind., and says that "the reasoning upon which it is based is regarded as unsound, and does not, therefore, support the conclusion reached." The court further speaks of the restriction as "not specific as to particular cases to which it applies, and hence it requires the exercise of legislative judgment in determining the question of its application in each case as it may arise. It is nevertheless a restriction binding upon the conscience of every member of the body, the application of which must be judged and determined as cases are presented, under the oath which all the members are required to take before entering upon their duties to support the constitution of the State," etc.

It is said, and with great force, that in consequence of the habit in our Legislature of giving the local member anything of a local character he may ask, we are deprived altogether of the benefit of the constitutional provision under consideration. I am well aware of this fact, and believe the public good would have been subserved had the prohibitory list in our constitution been considerably extended, and had less been left to the legislative discretion. But the remedy is not in the judiciary, but in the more careful selection of members of the Legislature, and perhaps in further constitutional amendments.

I think the judgment of the court below should be affirmed. Judge Adams concurs.

Judge Wagner adheres to his opinion delivered in The State *ex rel.* Henderson v. Justices of Boone County Court.

A. SUMNER, Appellant, *v.* JAMES SAUNDERS, Respondent.

PER CURIAM. BLISS, J., dissenting.

1. *Agency — Declarations of agent, when competent as* res gestæ. — An agent cannot prove the fact of his agency by his own acts and declarations alone; but when that fact has been established *aliunde*, proof of his acts and declarations during the pendency of negotiations for a sale by him as agent, is competent as part of the *res gestæ* to show the character and extent of his authority.

Appeal from Shelby Circuit Court.

Geo. Denison, for appellant.

Lipscomb & Hale, for respondent.

ADAMS, Judge, delivered the opinion of the court.

Plaintiff sued on a note executed by defendant, October 20, 1869, due six months after date, and payable to the order of plaintiff.

Defendant, in his answer, admits the execution of the note, but states that on the 22d of March, 1870 (which was before the note was due), he (defendant) paid plaintiff, through his (plaintiff's) agent, Alexander Schriver, the sum of $50, in part discharge of

the note, and sets up tender of the balance, $38.70, and bring it into court subject to its order and control.

Plaintiff, in his reply, denies that defendant paid the $50, as alleged, in part discharge of the note, and denies that Alexander Schriver was plaintiff's agent for the collection of the note.

On the trial the defendant was introduced as a witness on his own behalf, and offered to prove what transpired at the time the note was given, to which plaintiff objected, but the court allowed him to testify, and the plaintiff excepted. He then testified as follows: "I gave the note to Alexander Schriver, who claimed to be agent for A. Sumner, for a sewing machine, and afterwards I paid Schriver fifty dollars. When he took the note he said I could pay it at any time to Mr. Miller, by going to the express office at Shelbina, or to himself. There was an understanding that I could pay it at any time. I only wanted three months' time on the note, but he gave me six months' time. The name of A. Sumner was on the machine. It was brought to my house in a wagon. A. Sumner's name was on the sides of the wagon. At the time I bought the machine Schriver gave me a printed card, which card contained the following words and figures printed thereon: 'Alexander Schriver is our agent for Shelby county, Mo., and will sell Wheeler & Wilson's sewing machines at the following prices: No. 1, silver-plated on half case, walnut or mahogany, $95.00; No. 2, bronzed ditto, $85.00; No. 2, bronzed, on plain table, $75.00. We allow no deviation from these prices. Customers will find it greatly to their advantage to purchase direct from the agent, as the machine will be delivered at their homes and instructions given in the use, free of charge. Letters addressed to Alexander Schriver, Shelbyville, Mo., will receive prompt attention. A. Sumner.'" On the reverse side of this card is given a price list of A. Sumner's seven-octave piano-fortes, with the name of A. Sumner printed thus: "A. Sumner, St. Louis, 415 N. Fifth street." The said card was read in evidence against the objections of the plaintiff.

The witness further testified: "At the time I paid Schriver the $50, he gave me a paper [paper shown to witness]; that is the paper. Schriver wrote his name to it and gave it to me for the

money I paid him." This paper was read against the objections of plaintiff, and reads as follows: "$50. Shelbina, Mo., March 22, 1870. Received for A. Sumner, from James Saunders, cash $50, note $35, for one Wheeler & Wilson sewing machine, style 2 h. c., number 366,299. Alex. Schriver, agent. Bill of sale, with warranty, will be issued by A. Sumner, 415 N. Fifth street, St. Louis." A large part of this paper was printed, especially the name of A. Sumner, where it appears, and on the back is a list of A. Sumner's piano-fortes, which it is unnecessary to set out here.

On cross-examination witness testified: "I lived near Lakeman when I bought the machine, and when I paid the $50 to Schriver; my wife paid Schriver the fifty dollars. I was away from home when Schriver first came, but I think I got home before the money was paid. I was to pay it any time I got the money; Schriver did not have the note; I did not know where it was. The note was not due when I paid the $50. I never saw A. Sumner. I only know Schriver was Sumner's agent by what Schriver told me and others have said. James Vandevor told me Sumner wrote to him that Schriver was his agent, but not authorized to throw in extras with machines."

This was all the testimony offered in chief by defendant.

The plaintiff then asked the court to instruct the jury to the effect that, admitting the testimony given on behalf of the defendant to be true, he has failed in his defense. This instruction was refused, and the plaintiff excepted.

A deposition given by plaintiff was read on his part, in which he admits that Alexander Schriver was his agent in the fall of 1869, but says that he quit the business early in the year 1870, and states that during the time he was selling machines he was not announced as a collector, and had no authority to collect notes. He says nothing about the card which Schriver produced when he sold the machine, and there is no evidence to show that it was not genuine.

The jury, under the instructions of the court, found a verdict for the plaintiff for the amount tendered, allowing a credit for the $50; and the plaintiff filed a motion for a new trial, which was

overruled. It is unnecessary to notice the instructions given at the close of the case, as the main point is the action of the court in overruling the plaintiff's demurrer to the defendant's evidence. If this evidence was competent and tended to prove the issues on his part, the rulings of the court in giving and refusing instructions at the close of the evidence were not, in my opinion, subject to criticism. The whole question is whether Schriver was the plaintiff's agent and had authority as such to receive the $50. That Schriver was agent to sell the machine and take the note, results from the fact that the plaintiff claims this note as his property; there is no pretense that the note was given for anything else than a Wheeler & Wilson sewing machine; the defendant so testifies, and there is no evidence to the contrary. He testifies that he bought the machine from Schriver, who claimed to be agent of Sumner (the plaintiff).

He testifies to what was said and done at the time of the sale, and produced Sumner's card, which was exhibited and shown to him during the pendency of the negotiations; and this card shows that Schriver was the agent for the plaintiff, for Shelby county, and advises all persons to buy directly from this agent, and that parties can correspond with this agent by writing to him at Shelbyville. Now, all these facts and admissions took place during the pendency of the negotiations for a sale, and are not mere hearsay or declarations of an agent, but are *res gestæ*, and as such are evidence. No one can constitute himself agent by his own declarations merely. To make his declarations and acts evidence his agency must be proved *aliunde*. That was done in this case. The acceptance of the note which was given for the machine was a recognition of the agency of Schriver, and the only question is as to the extent of his authority. By the card read in evidence, which is admitted to be genuine, Schriver was held out to the people of Shelby county as a general agent of plaintiff for that county. If there were any restrictions on his agency they were not brought home to the defendant. The doctrine in regard to the payment of negotiable paper before it becomes due, when it is outstanding in the hands of an innocent holder, has no application here.

The principle is well settled that if a payment is made before such paper becomes due, and it afterwards goes into the hands of an innocent purchaser before maturity, he can recover the whole amount, regardless of such payment. In Wheeler v. Quill, 20 Pick. 545, so much relied on by the counsel for the appellant, the court does not touch this question of agency. That court declared the familiar principle above alluded to, in regard to the payment of negotiable paper before maturity, and denies that the person who received the payment was agent of the owner, and on that ground allowed a recovery of the whole amount. Here the payment was made to the plaintiff's agent, which, in law, was a payment to the plaintiff himself—*qui facit per alium facit per se.*

I think the testimony given for the defendant was competent, and tended strongly to prove the issues for him. In my opinion the demurrer to the evidence was properly overruled, and the judgment of the Circuit Court ought to be affirmed.

Judgment affirmed. Judge Wagner concurs. Judge Bliss dissents.

GEORGE W. HEWITT, SHERIFF, ETC., Defendants in Error, *v.* TIMOTHY LALLY, Plaintiff in Error.

1. *Partition, sale under—Judgment, motion for against bidder, etc.*—Where the purchaser at a partition sale refuses to pay the amount bid by him for the property, and the property is afterward resold for a less sum, the sheriff may recover the difference by proceedings on motion, as in case of sales under execution. (Wagn. Stat. 610, §§ 46, 47.)

Error to Hannibal Court of Common Pleas.

G. H. Shields, for plaintiff in error.

J. L. Robards, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

This was a motion made by George W. Hewitt, sheriff of Marion county, for judgment against Timothy Lally for the sum of $80, the amount of loss alleged to have been occasioned by his refusal

to pay the sum bid by him at a sale of certain lands under an order of the Hannibal Court of Common Pleas in partition. There is no dispute about any of the facts in the case. That Lally bid and refused to comply with the terms of the sale, that the property was re-sold and brought a less price, and that the proceedings were regular throughout, are all admitted. The court gave judgment on the motion for the plaintiff.

The case is argued in this court solely upon the theory that there is no law justifying the action of the court in giving judgment upon the motion; that the provision for such a proceeding upon execution sales does not extend to sales in partition. Under the head of execution the statute declares that if the purchaser refuse to pay the amount bid for property struck off to him, the officer making the sale may again at the same term re-sell such property to the highest bidder, or he may re-sell the property on a subsequent day as though no previous sale of the property had been had; and if any loss shall be occasioned thereby, the officer shall recover the amount of such loss, with cost, by motion before any court, or before any justice of the peace, if the same shall not exceed his jurisdiction; and such court or justice shall proceed in a summary manner and give judgment and award execution therefor forthwith. (Wagn. Stat. 610, §§ 46–47.)

The partition law provides that in partition sales "the sale shall take place during some day of the term of the court, and be governed by the same regulation prescribed by law for sales of real estate under execution, notice thereof being given by the sheriff in the same manner as provided by law for such sales." (Wagn. Stat. 960, § 31.)

If the bidder at an execution sale refuses to comply with his contract and carry out the same according to its terms, the officer may again re-sell the property, and the first bidder will be liable for any deficits that may occur by reason of the property not bringing the same amount on a second sale. This penalty is necessary to preserve integrity and prevent bad faith in judicial sales.

A sale made by the sheriff upon a judgment in partition is as much a judicial sale as a sale made by the same officer upon execution. And the reason for enforcing the same rule in respect to

the obligation of bidders is equal in both cases. That the statute intended to prescribe the same penalty in both classes of cases, I entertain no doubt. The partition sale takes place during the term of the court, and is to "be governed by the same regulations prescribed by law for sales of real estate under execution." The regulations do not extend simply to the notice of sale, but to the putting up of the property and bidding therefor, and if the purchaser refuses to pay or comply with the terms of his bid, then to the re-sale of the property and summary proceedings against the delinquent. The statute, though penal, is nevertheless remedial in its character and was designed to subserve a useful purpose.

The Legislature, when they enacted certain regulations to govern sales under executions, made them apply equally to sales in partition. The reason for the proceeding is the same in both, and the spirit and intention of the law will so apply to them.

With the concurrence of the other judges the judgment will be affirmed.

W. B. SEYMOUR, Plaintiff in Error, *v.* JOHN FARRELL *et al.*, Defendants in Error.

1. *Depositions — Appearance no waiver of dedimus.* — The appearance of an opposing party at the taking of depositions is a waiver of notice, but not a waiver of a *dedimus*.
2. *Evidence — Witness, character of — Impeachment.* — The character of a witness cannot be impeached by testimony as to specific facts.
3. *Bills and notes — Maker — Signature on back of note, legal effect of — Parol evidence.* — The signature on the back of a note, of one who is neither payee nor indorsee, is *prima facie* that of maker. But this presumption may be repelled by parol evidence. It may be thus shown that in fact he signed only as guarantor.

Error to Washington Circuit Court.

G. I. Van Alen, for plaintiff in error.

Upon the face of the note, Farrell was not the payee, nor was he in any legal sense an indorser.

The law has fixed and settled the *prima facie* contract of the parties, and in order to prove a different contract or promise to

pay, defendant should have pleaded it. (Buchner v. Liebig *et al.*, 38 Mo. 188; Schmidt v. Schmaelter, 45 Mo. 502; Bradford *et al.* v. Martin *et al.*, 3 Sandf., N. Y., 647; Jones v. Jeffries, 17 Mo. 577; Bunce v. Beck, 43 Mo. 266.)

Reynolds & Relfe, with *L. F. Dinning*, for defendants in error.

Under our law, Farrell was *prima facie* a joint maker. (Western Boatmen's Benevolent Asso'n v. Wolf, 45 Mo. 104, and authorities there cited; Kuntz v. Temple, 48 Mo. 71.) Under the law of Illinois, where this note was made, his liability was *prima facie* that of a guarantor. (Camden v. McCoy *et al.*, 3 Scam. 437; Carroll v. Weld, 13 Ill. 682; Webster v. Cobb, 17 Ill. 459; It was exclusively the province of the trial court to determine in what character he put his name on the back of the note. In Western Boatmen's Benevolent Asso'n v. Wolff, 45 Mo. 104, this court says: "In what character he put his name on the back of the note, was a question of fact within the exclusive province of the trial court to determine, and this court will not undertake to weigh the evidence." (See also Bonnell v. U. S. Express Co., 45 Mo. 423.)

ADAMS, Judge, delivered the opinion of the court.

This was an action on a promissory note brought by the plaintiff, as indorsee after maturity, against the defendants, charging them as joint makers. The contest was with the defendant Farrell, who signed his name on the back of the note, the other defendant having signed at the foot of the note. Farrell denied that he was maker, and claimed that he was only surety by way of indorsement or guaranty; and the whole question was whether he was one of the makers or a guarantor. He was not sued as guarantor, and there were no facts in the case to render him liable as such.

There was much evidence introduced on both sides on the main issue, and the case was submitted to the court sitting as a jury, and the court found for the defendants. Some depositions were filed in the case by the plaintiff which had been taken in Illinois,

and they were suppressed on the motion of the defendant, on the ground that no *dedimus* had been issued authorizing the officer to take them. The defendant, it seems, appeared at the taking of the depositions, but there was no waiver of the want of a *dedimus*. The appearance of an opposing party waives the want of notice of the taking of depositions, but it is not an express or implied waiver of the *dedimus*. The *dedimus* is what gives authority to an officer out of the State to take depositions. If a party expressly waives a *dedimus*, and depositions are taken on the faith of such waiver, he ought not to be allowed afterwards to raise the objection of the want of a *dedimus*. Such was not the case here, and the depositions were properly suppressed.

The defendant testified as a witness, and the plaintiff offered to prove specific charges of immorality to impeach his character for veracity. This evidence was properly excluded. Only evidence of a general character regarding veracity is allowed for that purpose, and specific charges cannot be preferred, as the witness is not presumed to be prepared to repel such attacks.

The plaintiff asked an instruction to the effect that the note itself showed that the defendant was a joint maker, and no evidence could be introduced to the contrary. If the defendant's name had appeared at the foot of the note in the usual place as maker, the instruction would have been proper. But the name was signed on the back of the note. Under the law as laid down by our court, his signature on the back of the note was *prima facie* evidence that he was maker of the note. But this presumption may be repelled by parol evidence. It may be shown that he signed only as guarantor. Such evidence does not vary or contradict the written note, but proves that a blank or space was left to be filled up with an independent contract of guaranty.

The plaintiff also asked an instruction to the effect that if defendant signed the note as surety, that made him liable as a maker. This instruction was refused, evidently on the ground that the word "surety" in the instruction was understood by the court to mean guarantor.

The whole contest was whether the defendant was a guarantor, and when the term "surety" was used it was calculated to mislead, as it might in this case be held to mean guaranty.

Upon the whole case I see no reason for disturbing the judgment.

Judgment affirmed. Judge Wagner concurs. Judge Bliss absent.

THE STATE OF MISSOURI *ex rel.*, ETC., TO USE OF MINNA FRANK, Defendant in Error, *v.* ADMINISTRATOR OF JOHN A. FRANK *et al.*, Plaintiffs in Error.

1. *Bonds may be reformed by courts — Evidence of mistake should be clear, etc.*—Courts may reform bonds, both as against principals and sureties. But to authorize such steps, the evidence must be unequivocal to show the existence of the mistake and its precise character. Thus a court may insert the penalty in a bond, where the same was omitted clearly by mistake, and the extent of the liability of those who executed the instrument can be definitely ascertained.

Error to Cape Girardeau Circuit Court.

Dennis & Wilson, for plaintiffs in errors.

W. W. Cramer, for defendant in error.

BLISS, Judge, delivered the opinion of the court.

The petition alleges that John A. Frank was appointed administrator of the estate of George D. Frank, father of Minna Frank; that he executed the usual administration bond, with the other defendants as sureties, but that by accident or mistake the bond omitted to specify the penal sum; and plaintiffs ask for its reformation by filling the blank. The petition does not name any specific sum which was supposed to have been inserted, nor does it allege that it was executed in blank, with authority to fill

it up, which those interested neglected to do. The defendants demurred, the demurrer was overruled, and judgment was given according to the prayer of the petition.

The right to reform a bond against sureties has been sometimes denied (Ward v. Wibber, 1 Wash., Va., 274; Harrison v. Minge, 2 Wash., Va., 136), but it is, notwithstanding, well settled that courts will make these instruments, as well as others, what the parties intended and supposed them to be, and against sureties as well as against principals. (Crowly v. Middleton, Prac. in Ch. 309; Harris, Adm'r, v. Pitman, 2 Hay, N. C., 331; Wiser v. Blackley, 1 Johns. Ch. 609; Burg v. Radcliffe, 6 Johns. Ch. 302.) But there must be clearness and certainty in showing the mistake. Every presumption is in favor of the instrument as it is, and the evidence must be unequivocal to show both that an error was committed and also its precise character. This implies the ability to show the language the parties intended to use. In the present case, that there was a mistake is sufficiently clear. A bond was filed, regular in all its parts except the filling of a blank, in the usual printed forms, with the amount of the penalty. Letters were issued and the estate settled. The court would be warranted in assuming that the parties intended to insert a penalty, and that the Probate Court supposed it was in the bond when approved. Without such intention their action would be a fraud and imposition on the court, which will not be presumed. But there is nothing in the petition to show what the penalty was, and hence the demurrer should have been sustained. The court gave judgment for $2,000, but the sum might as well have been $200 or $10,000, for the pleading would sustain one sum as well as another. It was therefore radically defective, and in a most material point. So far as the principal is concerned, it might not matter, for he would be personally responsible for the amount of his defalcation whatever the penalty. But it is not so with his sureties, for their liability is expressly limited, and the extent of this limitation is material; it was a part of their contract, and the instrument when reformed must show it, and show it correctly. The petition should have expressly pointed out the error, and was properly demurred to for not having done it.

As this case will be remanded with leave to amend, it is proper to say that the records of the Probate Court should show in the approval of the bond, or in the order fixing its amount, what was its penalty. If they have been properly kept, it will not be very difficult to ascertain the extent of the liability assumed by those who executed it; but unless it can be shown by that or some other competent evidence, the court cannot guess at it, or arbitrarily make it large enough to cover the default of the administrator.

The other judges concurring, the judgment will be reversed and the cause remanded with leave to amend the petition.

FREDERICK W. DAMSCHROEDER, Defendant in Error, *v.* FRANCIS THIAS, Plaintiff in Error.

1. *Equity — Frauds and trusts — Statute of frauds.*—Where one acquired the title to premises by fraud, and by the same means induced the owner to attorn to him, a court of equity would declare him a trustee for the true owner. He could not in such case invoke the statute of frauds, and claim that agreements by which the title was obtained were verbal, and, therefore, void under that statute. The statute of frauds was never intended for the protection of fraud.
2. *Equity — Injunction — Landlords — Summons before justice of the peace, etc.*—Injunction will lie against proceedings before a court of justice, on a landlord's warrant, where the equitable title to the premises is being tried between the same parties, at the same time, in another court. One of the offices of an injunction is to prevent a multiplicity of suits, where the whole question can be decided in a single proceeding.

Error to St. Louis Circuit Court.

Lubke & Player, for plaintiff in error.

W. C. Jones and *J. D. Johnson*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding in equity for an injunction to restrain the plaintiff in error from prosecuting a suit for rent and possession against the defendant in error, and from collecting rent of defendant in error for the real estate in controversy. From the

petition and answer it appears that Damschroeder on the 8th day of March, 1859, acquired the fee-simple title to a lot of ground situated on Eleventh street, in the city of St. Louis; that afterwards on the 10th of June, 1859, he executed and delivered to Thias, the plaintiff in error, a deed of trust upon this lot of ground, securing to him the payment of four notes, amounting in the aggregate to $2,040, the last maturing one of these notes being for $1,785, and being payable two years after the date of the deed of trust; that one August Reipschlaeger, the then business partner of Thias, was the trustee in this deed of trust, and by the deed of trust was given power to sell at auction the lot of ground, upon due advertisement in default of the payment of the notes. On the 15th of May, 1862, Reipschlaeger advertised the property for sale to pay the note for $1,785, which was then past due and unpaid, and on the 15th of July, 1862, he made the sale and Thias, the plaintiff in error, became the purchaser of it at the sum of $1,700, and the trustee conveyed the lot to him in fee simple. The petition then alleges that on the 15th day of July, 1862, before the trustee's sale had taken place, a contract and agreement was entered into between Damschroeder and Thias, in the presence of Reipschlaeger and others to the effect that no sale should be made under the deed of trust if Damschroeder would pay to certain parties named Brotherton & Sturgeon $500, and would also pay $85 on account of the note held by Thias; and that thereupon Thias agreed to extend the payment of the remaining $1,700 as long as the plaintiff should continue to pay interest thereon; that notwithstanding this agreement, and in violation thereof, and in the absence of the defendant in error, and while he was thrown of his guard, the plaintiff in error, Thias, procured the sale to be made by which he acquired title to the lot of ground. It is further averred in the usual terms that this conduct of the plaintiff in error was fraudulent, and intended to cheat defendant in error out of the property, which the petition claims to have been worth fully $5,000. The petition then alleges that after the sale the plaintiff in error presented to the defendant in error a claim for rent for the premises, and that defendant in error then attorned to plaintiff in error, as his tenant of said lot,

upon plaintiff—in—error's representation that he had caused the property to be sold only for the purpose of settling all questions or disputes as to the title of the property, and that he, the plaintiff in error, did not wish to retain it, but would reconvey it to defendant in error as soon as plaintiff in error was paid by way of rent the full amount of his claim, and interest; that in consequence of this representation, which it is not stated was in writing, defendant in error has paid to plaintiff in error, at various times, rents exceeding the sum of $3,194, which is in excess of plaintiff in error's claim. All of the material averments in the bill were denied in the answer.

The petition further charges, and the answer admits, that on the 1st of April, 1871, defendant in error filed in the St. Louis Circuit Court, against plaintiff in error, a petition in equity to set aside the sale of said property to plaintiff in error, on the grounds set forth in the petition, and for other reasons not in the petition in this case specified, for a decree vesting the title in the plaintiff therein, and for an account, and alleges that this suit is pending and undetermined; that after the filing of said petition, and on the 4th of April, 1871, plaintiff in error filed with a justice of the peace of St. Louis county an affidavit for a landlord's summons, seeking to recover $40 rent for said premises for the month of March, 1871, and the possession of said premises should the defendant in error fail to pay his rent before judgment. The petition also states that inasmuch as defendant in error could not set up his equitable claim to said property in the suit before the justice of the peace, he was remediless, and unless plaintiff in error was restrained from prosecuting that suit, great and irreparable damage would be done to him.

There is no allegation in the petition of insolvency on the part of the plaintiff in error.

A temporary injunction was granted when the petition was filed, but when the answer came in, on motion of the plaintiff in error, it was dissolved by the court at Special Term. The cause was then taken to the General Term, where the ruling of the court at Special Term was reversed, and the temporary injunction reinstated. The case now comes here by writ of error, to reverse the

decision of the General Term and affirm the ruling of the Special Term. Three grounds are urged in this court to procure a reversal: first, that the contract between the parties, if any, being merely verbal, was void by the statute of frauds; secondly, that the statute of limitations constituted a good defense; and thirdly, that injunction was not the proper remedy.

If the matter stated in the bill be true, then Thias, the plaintiff in error, acquired the title fraudulently, and induced the defendant in error to attorn to him by the same means, and he holds the legal title in such a manner as would authorize a court of equity to declare him a trustee. It is well settled that frauds and trusts are not within the statute of frauds. This is the general principle and has been the uniform ruling of this court. In the case of Rose v. Bates, 12 Mo. 30, Mrs. Rose held a mortgage upon property which was about to be sold to satisfy an execution having priority over the mortgage in favor of Bates. Before the sale a verbal contract was made between them that Bates should purchase the property, and, upon the payment of the amount of the execution and certain rents, he should convey it to Mrs. Rose. Bates purchased the property, and when Mrs. Rose tendered him the money he refused to comply with his agreement, and relied upon the statute of frauds as a defense to protect him. But it was decided that he was not protected by the statute of frauds; that the statute was never designed to aid a party in committing a fraud, but was intended to prevent frauds, and consequently could not be invoked to aid the defendant. In Groves' Heirs v. Fulsome *et al.*, 16 Mo. 543, Groves entered a tract of land, and finding the wife of Fulsome in possession without any claim of pre-emption, paid her for yielding up possession to him. Subsequently she obtained a patent for the land from the government, under color of a right of pre-emption, and it was declared that she held the title thus acquired for the benefit of Groves, and that she could not rely on the statute of frauds. It is tersely said in the judgment: "It is obvious that the statute of frauds has no application in this cause. That statute has never been perverted to the protection of frauds. It is well settled that frauds and trusts are not within the provisions of the statute."

In affirmance of these views and illustrating the same principle, see the case of Peacock v. Nelson, 50 Mo. 256. The statute of limitations was no obstacle to the maintenance of the plaintiff's suit. Without adverting to the distinction that has been taken as to the meaning of the statute between the cases of express trusts and those which were merely implied or constructive, it is sufficient to say that the suit was for the recovery of lands, and no period short of ten years will be a bar in such a case. (Wagn. Stat. 915, § 1.)

The next question is whether injunction will lie in a case of this kind. An injunction cannot be maintained where the party has an adequate remedy at law, or where the injury complained of will not work irreparable mischief. Where the defendant is solvent and the damages are susceptible of adjustment and compensation, there is no necessity for appealing to the interposition of equity by injunction. (James v. Dixon, 20 Mo. 79; Burgess v. Kattleman, 41 Mo. 480; Weigel v. Walsh, 45 Mo. 560; Anderson v. St. Louis, 47 Mo. 479.) But, as a general rule, whenever, by accident or mistake or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained. (2 Sto. Eq. Jur., § 885; Daniels' Ch. Pr. 1725; Dale v. Roosevelt, 5 Johns. Ch. 174; Matter of Merritt, 5 Paige, 125; Miller v. McCan, 7 Conn. 457; How v. Mortell, 28 Ill. 478; Atlantic Delaine Co. v. Frederick, 5 R. I. 171; Ferguson v. Fisk, 28 Conn. 511; Weed v. Grant, 30 Conn. 74; Dehon v. Foster, 4 Allen, 545; Davis v. Hoppes, 33 Miss. 173.) Under this rule, courts of equity issue injunctions against proceedings in another court as an auxiliary writ to restrain parties from litigation before the ordinary tribunals, where equitable elements are involved in the dispute, as, for example, to restrain an ejectment by a trustee against his *cestui que trust*, or by a vendor, bound to speccific performance, against the purchaser. (Adams' Eq. 194.)

In our general practice these principles are modified by the code, as now the equitable matter may be set up in defense in the tribunal where the proceeding is instituted. But in the present case, while the equitable title to the land was being tried and the suit was pending in court, the party resorts to an unfair advantage in a court where the defendant could not avail himself of his rights.

Suppose the defendant in error should be turned out of possession under the landlord and tenant act, and afterwards, when the suit in the Circuit Court was determined, it should be adjudged that he had the title and the premises were rightfully his, he might then have to commence another action to regain possession. One of the offices of an injunction is to prevent a multiplicity of suits where the whole question can be decided by one and the same proceeding. It is, moreover, doubtful whether, if the party were turned out of possession and the premises were afterwards adjudged to him, and he should be compelled to institute an action for their recovery, the law would afford him complete and adequate compensation. Under all the circumstances I think it is a proper case for an injunction, and am in favor of affirming the judgment.

Judgment affirmed. The other judges concur.

WM. S. HUNGERFORD, Defendant in Error, *vs.* GEORGE P. FAY, *et al.*, Plaintiff in Error.

Judgment affirmed.

Error to Cape Girardeau Circuit Court.

L. Houck, for Plaintiff in Error.

L. Brown, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff brought his action in ejectment against the two Fays to recover the possession of a certain piece of land. The Fays were personally served but made no answer and permitted a judgment to be taken by default. At the same term upon motion, Franklin came in and was made a co-defendant. He filed his answer, setting up that one of the Fays had a title superior to that of plaintiff. The cause was then continued, and at the next term, no motion being made to set aside the interlocutory judgment, the court gave final judgment against the Fays, and refused to let Franklin make a defence for them, which they had not seen fit to make for themselves.

The regular costs of the suit were adjudged against the original defendants, and the special costs which Franklin made by his intermeddling, were assessed against him and it was from that judgment that he sued out his writ of error.

In the first place, it is not perceived what right Franklin had to volunteer a defence for the Fays, which they failed to make for themselves. Secondly; it was not competent to defend for them on the merits, when the judgment by default remained in force.

We think the court was right in assessing against Franklin the costs which he had been instrumental in causing.

And finally we will remark, that this court will give no encouragement to the too prevailing practice of bringing cases here which have no merit, and involve only trifling pecuniary amounts.

Judgment affirmed. The other judges concur.

JOHN L. THOMAS, Plaintiff in Error, *vs.* THOMAS MATHEWS, Defendant in Error.

1. *Fraud, Limitations—Statute of—commences running, when.*—In actions for relief on the ground of fraud, the statute of limitations begins to run from the discovery of the fraud, and where the fraud is connected with the conveyance of realty, ten years constitutes the bar. (Hunter *vs.* Hunter, 50 Mo., 445.)

Error to Iron Circuit Court.

John L. Thomas, pro se.

Fisher & Rowell with *J. J. Williams*, for Defendants in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a Bill in Equity, to set aside an alleged fraudulent conveyance, charged to have been made by Robert Mathews to his brother, the defendant, in the year 1855, to defraud creditors prior and subsequent.

The answer denied all fraud and set up the statute of limitations of ten years after the making of the deed, and before the commencement of the suit.

On motion of the plaintiff, that part of the answer setting up the statute of limitation was struck out and the defendant excepted. But the whole case is now before this court with the evidence preserved in a bill of exceptions, and we will consider the case as though no such motion had been made or acted on. If there was any fraud in the conveyance from Robert Mathews to his brother Thomas Mathews, it was consummated at the time of the execution and recording of the deed in 1855. In actions for relief on the ground of fraud, the statute of limitations commences to run from the discovery of the fraud; and where the fraud grows out of realty or the conveyance of realty, ten years constitute the bar, and in regard to personalty, five years. See Hunter, *et al.*, *vs.* Hunter, 50 Mo., 445, and cases cited.

There was no pretense that the alleged fraud, if any, was concealed and not discovered till within ten years before the commencement of this suit. There was no continuing fraud

shown by the evidence. The preponderance of testimony strongly tends to show, that all the improvements made on the land since the conveyances were made or paid for by the defendant, and that Robert Mathews was in possession merely as tenant of the defendant. Under this view, the plaintiff's action to set aside the alleged fraudulent conveyances was barred by the statute of limitations.

It is therefore unnecessary to discuss the evidence in detail, as the judgment was for the right party it must be affirmed.

Judge Wagner concurs. Judge Bliss absent.

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WILLIAM LONG Plaintiff in Error, *vs.* J. S. WILCOX, *et al.*, Defendant in Error.

1. Judgment affirmed for want of exceptions.

Error to Washington Circuit Court.

G. Van Alen and *Emerson & Dillingham*, for Plaintiff in Error.

Reynolds & Relfe, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

We are asked to review the action of the Circuit Court on the evidence and instructions given and refused, without any exception being saved to the action of the court in overruling the motion for a new trial.

The object of a motion for a new trial, is to allow the Circuit Court to correct the errors made during the progress of the trial. If the motion be overruled, and no exceptions saved, the presumption is that the party acquiesced in the ruling of the court and he is not entitled to any relief here.

Let the judgment be affirmed. Judge WAGNER concurs. Judge BLISS absent.

GRANVILLE L. MCCLURE, Defendant in Error, *vs.* S. B. FARTHING, *et al.*, Plaintiffs in Error.

1 *Guardian ad litem cannot make agreement in one case as to another.*—A guardian *ad litem* cannot make a binding agreement that the decision in one case shall determine that in another, although the cases involve precisely the same facts, and the same parties and substantially the same points of controversy.—He has but one duty to perform and that is to defend the action.

Error to Montgomery Circuit Court.

R. W. Jones, for Plaintiff in Error, cited Revely vs. Skinner, *et al.*, 33 Mo. Rep., pages 98 and 99; 5th Howard, P. R. 341.

Sanders & Carkener, for Defendants in Error.

In the "agreement" there is no admission that the plaintiff's case was proved, or that any fact on which it depended was true. The sense of the agreement is "that the witnesses would swear in this case as in the one just tried',' not that plaintiff's witnesses had proved a singly fact.

The case of Revely vs. Skinner, 33 Mo., p. 98, is not therefore in point. The error in that case is that the court assumed an issuable fact to be true, although the answer of the guardian put it in issue, and the court has no proof, either one way or the other, and the acts condemned in the quotations from the case in the 5th How. P. Repts., were by agreement between the guardian and plaintiff to be considered as admitted or as established by less than legal proof. The gist of that decision is, that the guardian shall not usurp the province of the court or jury. The records of this case disclose nothing done contrary to the doctrine of that.

BLISS, Judge, delivered the opinion of the court.

Some of the defendants in this cause were minors and answered by guardian *ad litem*, and during its pendency the attorneys for the plaintiff and for the other defendants, made an

agreement in writing stipulating that "a final decree should be entered in the cause for the plaintiff upon the trial and evidence adduced in the other cause tried by the court, in which a decree was entered for plaintiff; the evidence and points of controversy upon the title being substantially similar." It was farther stipulated that if the former decree should be reversed, that rendered in this cause should be set aside. A general judgment was rendered upon this agreement, against all the defendants, and afterwards the guardian *ad litem* of the minors presented his motion to set it aside, as having been unauthorized by him and unwarranted by law, even had he given his consent, but the motion was overruled.

A guardian *ad litem* has but one duty, and that is to defend the action. Revely *vs.* Skinner, 33 Mo., 98. It is un necessary to say that when there are several actions pending between the same parties, involving precisely the same facts, the guardian may not agree to submit the whole upon a single examination of witnesses, or, which is in effect the same thing, that the decision of one shall decide the whole. Such an agreement may be consistent with his duty, but that is not this case.

The record shows that the agreement was made by the attorneys of the other parties, who did not and could not represent the minors, and that it was made after the trial of the other cause, a cause not shown to have involved the same issues and evidence, but only evidence and points substantially similar.

The motion should have been sustained, and the judgment overruling it is reversed and the cause remanded.

The other judges concur.

STATE OF MISSOURI, Plaintiff in Error, *vs.* ANTHONY PECK, Defendant in Error.

1. *Criminal law—Indictment—Fee of Prosecuting Attorney.*—On an indictment for disturbing the peace, the Circuit Attorney is entitled to no more than one fee of five dollars, although the indictment contains more than one count and more than one fine is assessed. (Wagner Stat. 619, § 2, clause 3.)
2. *Practice, criminal—Writ of Error, when allowed in Criminal Cases.*—When a defendant has been tried and acquitted, the state is not entitled to a writ of error; but on all other final judgments or indictments, the writ is allowed.

Error to Perry Circuit Court.

B. Benson Cahoon, Attorney for Plaintiff in Error.

1. The fee of the Circuit Attorney in this case, is controlled by the *third* clause of § 2, W. S., 619.

2. The defendant was indicted under § 27, W. S., 496. The indictment contained four counts, and charged the commission of four different and distinct offenses. He was *convicted* on three of the counts, and on each count, was fined seperately; hence there were *three convictions* of the defendant, upon three offenses charged separately in three of the counts, and the Circuit Attorney was entitled to three fees of five dollars each. (Borschenious *vs.* The People, 41 Ills., 236, 237 and 238.)

3. To say that each commission of a misdemeanor defined by a statute, making certain acts under it punishable, must be charged in seperate indictments, before the Circuit Attorney is entitled to his fee for each conviction, is to say that the records shall be unnecessarily numbered, and costs, even to defendant, unnecessarily added. It is submitted that a reasonable construction of the 3d clause of § 2, W. S., 619, under consideration does not warrant such a position. Broom's Legal Max. Am. Ed. §§ 174, 175, and authorities cited: Ram on Legal Judgment, Am. Ed. 1871, p. 111, 112 and 115.

Robinson & Clardy, for Defendants in Error.

The statute allows a fee of but five dollars in this case.

1. Wagner's Statute, Vol. 1, page 619. Ex parte Craig, 19 Mo., 337.

2. The Supreme Court has no jurisdiction in this case. The statute allows no appeal in favor of the State, except when an indictment is quashed upon motion or adjudged insufficient upon demurrer. No appeal therefore lies from the action of the Circuit Court, by the State. W. S., v. 2, 1114, §§ 13, 14.

Adams, Judge, delivered the opinion of the court.

This case presents the question, whether the Circuit Attorney ought to be allowed more than one fee of five dollars for conviction on an indictment containing three counts, when the defendant is found guilty on each count and three separate fines assessed for disturbing the peace.

The court refused to allow more than one fee of five dollars and the plaintiff has brought the case here by writ of error.

The language of the third clause of Wagner's Statutes § 2, p. 619, upon which the Circuit Attorney rests his right to several fees, reads as follows: "For conviction upon indictment when the punishment assessed by the court or jury shall be a fine or imprisonment in the county jail, or both such fine and imprisonment, five dollars." The language here used precludes the idea of several fees to be allowed in one case. The indictment forms but one case; there is but one verdict and one conviction. The defendant by one verdict and judgment is convicted of several offenses. The fourth clause of the same section, under the ruling of this court, only allows one fee "in any case when the punishment assessed shall be by confinement in the penitentiary, except cases of rape, etc., etc." See *Ex parte* Craig, 19 Mo., 337. If the Court construed the latter clause correctly that decision settles this case. There is no material distinction in the two clauses. If one allows several fees the other does also.

I think the decision in *Ex parte* Craig has been universally acquiesced in, in our State. I am aware however that the Supreme Court of Ills., in Borschenious vs. The People, 41 Ills.,

236, gave a different construction to a similar statute of that state. But we are satisfied with the ruling of our own court, and must adhere to it.

The point is raised that a writ of error at the suit of the State does not lie in this State. When a defendant has been tried and acquitted, the State is not entitled to a writ of error, but on all other final judgments on indictments the writ is allowed. See The State vs. Newkirk, 49 Mo., 472; State vs. Baker, 19 Mo., 683.

Let the judgment be affirmed. Judge Wagner concurs. Judge Bliss absent.

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HENDERSON N. KELLEY, Defendant in Error, *v.* HIRAM BLACKLEDGE, Plaintiff in Error.

Referee—Report of set aside, when.—To authorize a court to set aside a report made by a Referee, there ought to be at least evidence that the finding was unjust, or an affidavit of merits by the party attacking the report.

Error to Ste. Genevieve Circuit Court.

Robbins, Clardy & Cahoon, for Plaintiff in Error.

ADAMS, Judge, delivered the opinion of the court.

This was a suit for settlement of a partnership account between plaintiff and defendant.

The case was referred to a Referee to take the account, who set a time for hearing the case, and being sick adjourned it to another day.

The defendant failed to appear at the appointed day, and the Referee proceeded *ex parte*, and reported in favor of plaintiff for several hundred dollars.

The defendant excepted to the report upon the ground that no notice had been given of the appointed day, or of the adjournment, and on the trial of the exceptions evidence was given on both sides in regard to the notice and adjournment.

The evidence was contradictory, and the court upon the evidence given, overruled the exceptions. There was no evidence given, or affidavits made, of any meritorious defense against the result found by the Referee. The plaintiff remitted one hundred and twenty-five dollars of the amount found, and the court thereupon confirmed the report and gave judgment for the balance.

The exceptions seem to have been fairly passed on by the Court, and we see no reason to disturb the judgment. To authorize a court to set aside a report made by a Referee, there ought at least to be evidence that the finding was unjust, or an affidavit of merits by the party attacking the report.

Judgment affirmed. Judge Wagner concurs. Judge Bliss absent.

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THE STATE OF MISSOURI, to use of HORACE CRAIN, Plaintiff in Error, *vs.* HENRY CLAY LYNN, *et al.*, Defendant in Error.

1. *Justice's Courts—Attachment—Affidavit, amendment after levy.*

In an attachment suit before a justice, that officer would have power to allow the affidavit for attachment to be so amended after the original levy, as to authorize the seizure of property otherwise exempt from attachment, and the amendment would relate back to the date of the original levy.

Error to Mississippi Circuit Court.

J. M. Patterson & L. Houck, for Plaintiff in Error.

ADAMS, Judge, delivered the opinion of the court.

The only material point raised and discussed here, is whether a justice of the peace during the pendency of an attachment suit before final judgment, can allow the plaintiff in the attachment to file an amended affidavit, and whether such affidavit so amended would relate back so as to justify the officer in making the levy?

The amended affidavit contained grounds for the attachment which authorized the officer to levy on property otherwise exempt from attachment.

This suit is upon the constable's bond for making a levy on property exempt from execution, and not informing the defendant of his right to select such property, &c. The original affidavit would not have justified the levy.

The proceedings before the justice seem to be regular in all respects.

There was no exception in that suit to the filing of the amended affidavit, nor was there any plea in abatement of the attachment, although the defendant in the attachment was personally served, or appeared by attorney. How can the objection be urged in this collateral action, that the justice improperly allowed an amended affidavit to be filed? I am persuaded that the justice had the power to allow the amendment, and if he had, it certainly would relate back so as to justify the attachment.

Under this view the judgment will be affirmed. The other judges concur.

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H. HATCHER, *et al.*, Respondent, *vs.* J. B. MOORE, *et al.*, Appellant.

1. *Bill of Exceptions—Extension—Signing of.*—A bill of exceptions cannot be signed after the extension agreed upon has expired.
2. *Practice, civil—New trial—Exceptions—Appeal, etc.*—Where no motion for new trial is filed, and the errors complained of arise upon the trial, and should be preserved by exceptions, appeal will not be entertained.

Appeal from the St. Charles Circuit Court.

E. A. Lewis, for Appellant.

B. B. Kingsbury, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

There is no bill of exceptions in this case, that we can notice. The bill was not prepared, allowed and signed within the

time agreed upon by the parties, and therefore there was no authority for signing it at all. (Ellis *vs.* Andrews, 25 Mo., 327.) Again, what is fatal to the appellant's case here, is, that no motion was filed for a new trial, and the errors complained of, were such as arose upon the trial, and should have been preserved by exceptions.

Judgment affirmed. Judge ADAMS concurs. Judge BLISS absent.

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WEB. M. RUBEY, Respondent, *vs.* ED. C. SHAIN, *et al.*, Appellants.

1. *Judgment on demurrer. What will not support an appeal.*—A record entry that the "demurrer was by the court overruled; to which ruling the defendant at the time excepted; and defendant filing no further pleadings, judgment is rendered for plaintiff," is no such judgment as will support an appeal.

Appeal from Macon Court of Common Pleas.

W. M. Ruby, for Respondent.

F. White, for Appellants.

WAGNER, Judge, delivered the opinion of the court.

This was an action of trespass, and the defendant interposed a demurrer to the petition, which was overruled by the court.

There is no final judgment or assessment of damages in the case. The only record entry is, that the "demurrer was by the court overruled, to which ruling the defendant at the time excepted, and defendants filing no further pleadings, judgment is rendered for plaintiff." This is not such a judgment as will support an appeal.

We have looked into the petition, and from the allegations therein made, it is obvious that the defendants should have answered to the merits, instead of demurring. The appeal will be dismissed, but the court below should permit the defendants to file an answer if they see proper to do so. Appeal dismissed.

Judge ADAMS concurs. Judge BLISS absent.

ROSANA WAGNER, *et al.*, Appellants, *vs.* GEORGE PHILLIPS, *et al.*, Respondents.

1. *Sales, inadequacy of price, etc.*—Inadequacy of price taken by itself is not sufficient ground for setting aside a sale of land, but, when coupled with other facts it is a circumstance entitled to consideration.
2. *Lands, sale of—Bidders kept away—Competition repressed, etc.*—Where evidence shows that by the acts, connivance and representations of a purchaser, bidders were kept away from the sale of certain land; that competition was repressed when the sale took place, and that, except for these practices the land would have brought a price greatly in excess of that actually realized, the sale will be set aside.

Appeal from Shelby Circuit Court.

James Carr, for Appellant.

E. R. Burlingame, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding commenced in the Shelby Circuit Court, to set aside a sale by the sheriff, in partition, on the ground that the purchaser, who is the respondent here, by means of fraudulent practices and representations, deterred and kept away bidders; and, in consequence thereof, bought the property at a greatly inadequate price. The land sold consisted of one hundred and sixty acres, and was purchased by the respondent for the sum of one hundred and eight dollars; and the testimony all goes to show that it was worth from six to eight hundred dollars. The inadequacy of the price, taken by itself, would not be sufficient ground for affording relief; but when coupled with other facts, it is a circumstance entitled to consideration.

The record clearly shows that, by the acts, connivance and representations of the respondent, bidders were kept away from the sale, and competition was repressed when the sale took place; and that had it not been for these improper practices, the land would have brought at least, six hundred dollars.

The sale, therefore, should not be upheld. The judgment must be reversed and the cause remanded.

The other judges concur.

CHARLES C. MOORE, Defendant in Error, *vs.* JOAN MOORE, Plaintiff in Error.

1. *Witnesses. Dworce. In suits of, husband and wife may testify, when.*—Under § 1 of the act concerning witnesses, (Wag. Stat. 1372) where husband and wife are opposing parties, as in suits for divorce, they are competent as witnesses to give evidence as to all matters except communications made by the one to the other.

Error to Scott Circuit Court.

Myers, Ward, Watkins & Patterson, for Plaintiff in Error.

Lewis Houck, for Defendant in Error.

Although as a general rule husband and wife cannot testify against each other, this rule only excludes confidential communications and does not extend to facts equally accessible to any person not standing in that relation. 1 Greenlf. Ev. § 254. In Hoffman v. Hoffman, 43 Mo. 551, top of page, it seems the plaintiff testified.

ADAMS, Judge, delivered the opinion of the court.

This was a suit for divorce by a husband against his wife, in which a judgment was rendered in his favor.

The husband was allowed to testify as a witness on his own behalf, and the only question presented for our consideration is whether he was competent. This involves the proper construction of the first section of chapter 144, General Statutes (Wag. Stat., 1372, § 1), which enacts that "no person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same, as a party or otherwise, but such interest may be shown for the purpose of affecting his credit," &c.

The language used is broad enough to embrace all persons who are parties to a suit, including husband and wife, and must be so construed, unless they be excluded as incompetent by some other provisions of our statutes. Section 8 of the same chapter (Wag. Stat., 1374, Sec. 8) excludes several classes of persons as incompetent to testify, but husband and

wife are not named in this section as one of the classes. This section is a revision of section 6 of chapter 168 (2d R. C. 1855, p. 1577,) the fifth sub-division of which reads as follows: "Fifth—Husband and wife, for or against each other, or concerning any communication made by one to the other during marriage, whether called as a witness while the relation subsisted or afterwards, except in pleas of the state against the husband or wife for some breach of peace, misdemeanor or felony committed or threatened by one upon the person of the other." As this clause was omitted in the General Statutes, it was repealed by the general clause repealing all statutes which had not been revised and included in the general statutes. This repeal left husband and wife as they were at common law. In fact this clause was only a declaration of what the common law was before its passage. But while they are not allowed to testify in regard to the communications from one to the other, on the ground of public policy, section 1, above referred to, renders them competent as witnesses when they are the opposing parties to the suit, to give evidence of other matters not communicated by one to the other.

Where they are not opposing parties they are not allowed to testify for or against each other, on the ground of public policy, except that the wife under section 5 Wagner's Statutes, page 1373, is rendered competent to testify in the following cases: "First in actions on policies of insurance of property so far as relates to the amount and value of the property alleged to be injured or destroyed; second, in actions against carriers so far as relates to the loss of property and the amount and value thereof; third, in all matters of business transactions where the transaction was had and conducted by such married women as the agent of her husband; provided that nothing in this section shall be construed to authorize or permit any married woman while the relation exists, or subsequently, to testify to any admissions or conversations of her husband, whether made to herself or third persons."

There seems to be no express or implied exclusion of husband and wife as witnesses under our statute where they are the opposing parties. It would have been an easy matter for the legislature to have excluded them in express terms. As it has not done so, either by express words or by implication, we must conclude that it was the intention of the legislature to embrace them in the first section under the term parties, as competent witnesses.

The judgment will therefore be affirmed. The other judges concur.

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CHARLES C. WHITTELSEY, Respondent, *vs.* LOUIS ROBERT, Appellant.

1. *Limitation—Statute of—Debtor temporarily in the State—Absence from State—Running of statute.*—Under the act concerning limitations (Wag. Stat., 919, § 16,) if the debtor comes within the jurisdiction of the state, whether temporarily or not, and afterward departs from and resides out of the state, the time of his absence after such departure cannot be deemed or taken as any part of the time limited for the commencement of the action.

Appeal from Jefferson Circuit Court.

J. J. Williams, for Appellant.

The mere fact that defendant may have visited this state for a short time without changing his residence, did not in any sense affect the operation of the Statute of Limitations.

By the statutes of 1845, 55, 65, if the debtor was a non-resident of this state when the cause of action accrued, the statute began to run in his favor at once, and as nothing stops its operation when once it begins, the action of course would be barred at the expiration of the statutory limitation for commencing an action. (R. C. 1845, p. 717, sec. 7; R. C. 1855, p. 1049, § 12; Wag. Stat., p. 919, sec. 13; Thomas *vs.* Black, 22 Mo., p. 330.)

C. C. Whittelsey, pro se.

ADAMS, Judge, delivered the opinion of the court.

This was a suit for professional services as attorney at law, rendered by plaintiff, and for moneys paid between the years 1850 and 1860.

The only point relied on here is the statute of limitations, which was set up in the answer. The plaintiff replied that the defendant came into this State in June 1855, and departed from this State and resided out of the State ever since.

It was in proof that the defendant was a resident of Minnesota and never has resided in this State; but that he came to this State in June 1855, and after remaining a short time went out of the State to his home in Minnesota and has never returned. The defendant relies upon the fact that during the whole time that the various items of plaintiff's account were accruing, he was a non-resident of this State—and that the fact of his coming into this State, and then departing from the State, did not stop the running of the statute. The section of the statute of limitations relied on, is precisely the same in the variousrevisions of the laws of Missouri of 1845, 1855 and 1865, and reads thus: "If at any time when any cause of action herein specified, accrues against any person who is a resident of this State, and he is absent therefrom, such action may be commenced within the respective times herein respectively limited, after the return of such person into the State; and if after such cause of action shall have accrued, such person departs from and reside out of the State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." The first clause of this section was under review by this court, in Thomas vs. Black, 22 Mo. 330, and the distinction was discussed, and shown between that clause and the first clause of the same section of the statute of limitations of 1835; and the court held that a party who during all the time of the running of the statute had been a non-resident, and had not been in this State, was protected by such non-residence under this clause of the statute. The last clause of the section above quoted, is word for word the same as the last clause of the section of the statute of 1835,

and must receive the came construction. Under this clause it is only necessary that the party should be in the State, and depart from and reside out of the State, to stop the running of the statute.

If he comes within the jurisdiction of the State, whether temporarily or not, and afterwards departs from and resides out of the State, the time of his absence after such departure, cannot be deemed or taken as any part of the time.—(Cook's Ex'r. *vs.* Holmes, 29 Mo., 61.) The last clause was not touched by the case of Thomas *vs.* Black, and in my judgment it includes all persons who are here as residents, or who are non-residents and only temporarily here, and depart from and remain out of the State after the cause of action accrues. Any other construction would exclude non-residents entirely from the operation of the statute, and give them a preference not shown to our own citizens.

Under this view the Judgment of the Circuit Court, which was for the plaintiff, must be affirmed.

Judge WAGNER concurs. Judge BLISS absent.

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THE CITY OF ST. CHARLES, Appellant, *vs.* FRITZ NOLLE, Respondent.

1. *St. Charles. Charter of. Ordinance on Wagons, etc.*—So much of the ordinance of the city of St. Charles requiring a license tax for wagons used for pay, as attempted to impose a tax upon wagons of outside residents engaged in hauling into and out of the city, was void as not being authorized by the charter of that city, and the Legislature could give the City Council no authority to pass such an ordinance. The tax being upon outside citizens and for the benefit of those living in the city, would be in effect taking property for private use; that is, for the use of a particular community of which the outside citizens form no part.

Appeal from St. Charles Circuit Court.

F. McDearmon, City Attorney, for Appellant, cited Gartside *vs.* East St. Louis, 43 Ill. 47; Kennedy *vs.* Snowden, 1 McMill. 323; Dillon on Munic. Corp. p. 135, § 93, p. 278, §§ 250, 253; p. 522, § 540.

T. Bruere, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was a prosecution commenced before the Recorder of the city of St. Charles, charging the defendant with violating an ordinance of the city requiring a license tax for wagons used for pay, from which an appeal was taken to the Circuit Court, where the defendant was acquitted on the ground that the alleged ordinance is invalid. The case was tried on the following agreed statement of facts: "Nolle, the defendant, was hauling lumber for Hallrah & Macheus from Judges Landing on the Mississippi River about seven miles below the city of St. Charles, to their lumber yard in the city of St. Charles, without first having taken out a license under the above ordinance as a drayman or wagoner. Nolle is a farmer and non-resident of the city, living about five miles below the city in the neighborhood of said landing. He does not make hauling for hire, his regular business, but did the hauling in this instance for compensation. The above ordinance and original ordinance are considered in evidence.

The ordinance referred to is to the effect—"That every owner or driver of any dray, cart or wagon used or kept to carry or convey goods, wares or merchandise or any species of property or thing for hire, from one part of the city to another part, or *from places within the city to places without the city, or from places without the city to places within the city* shall register and number the same with the city Register," give bonds, &c., &c.

The charter of the city of St. Charles provides that "the Mayor and councilmen shall have power by ordinance, to provide for licensing, taxing and regulating hacks, drays, wagons and other vehicles used within the city for pay." It is also provided by the charter that "they shall have power to pass ordinances for the regulation and police of said city, and the commons, thereunto attached and belonging, as the said Mayor and councilmen shall deem necessary to carry into effect the object of this act, and the power hereby granted as the good of the inhabitants may require."

These are all the provisions of the charter bearing on the question. A city can only pass such ordinances as are warranted by its charter. There seems to be no authority, expressed or implied, in the charter of the city of St. Charles to authorize the imposition of a tax license on wagons engaged in hauling outside of the city.

It was not contemplated by the legislature that the free ingress, egress and regress of outside citizens should be impeded by taxation, to be imposed by the city. It cannot be found in that part of the charter allowing tax license to be imposed on wagons, &c., used for pay in the city. The language used excludes such interpretation—"*expressio unius exclusio alterius.*"

The conclusion cannot be drawn from the authority to regulate the police of the city, for that must be confined to the city limits.

Besides, if the legislature had given the power in so many words, in my judgment, such legislation would have been void as going beyond the limitation of legislative power. Although there may not be any express limitation on legislative power in our State constitution, in many instances the very nature of our State governments and the purposes for which they were created, must form a barrier to legislation which deprives one portion of the community of its property for the benefit of others.

The proper construction of the constitution in regard to taxing private property for public use, is that it can be taken only for public use and not for private use at all, and when taken for public use there must be a just compensation allowed and paid. To tax occupations outside of the city, for the benefit of those living in the city, is in effect, taking the property of the citizens for private use; that is for the use of a particular community, of which the outside citizens form no part. Whether it be called a tax or the appropriation of property, the result is precisely the same. In Wells *vs.* the City of Weston, 22 Mo., 384, Judge Leonard in an able opin-

ion which was concurred in by the whole court, vindicated the position here assumed.

The legislature had undertaken to empower the city of Weston to tax lands adjoining the city, to the extent of a half mile, for local purposes; and the city under this authority had imposed taxes which the plaintiff Wells resisted. The court pronounced the law unconstitutional. I am aware that in Virginia, in Laughore & Scott *vs.* Robinson, 20 Grattan's Rep. 661, a question somewhat similar arose and by a divided court court the constitutionality of the act of the Virginia legislature was upheld as being consistent with the constitution of 1830. The town of Lynchburg was authorized to issue bonds for stock in the Lynchburg & Tennesse Railroad Co. bearing six per cent. interest, and for payment to levy taxes upon the lands, property and persons of all those within the town proper and for half a mile beyond its limits. The opinion of the court was based upon the taxing power of the State legislature, and as there was no constitutional limitation on this power, the court held that the legislature could transfer this power to any particular municipality or body of men, to be exercised by them instead of the legislature. The case of Wells *vs.* The City of Weston, was not referred to by the Virginia court, and the line of reasoning maintained by our court, was wholly ignored by Judge Jones in the Virginia case. We must adhere to the principles laid down by our own court as being more consonant with the implied limitations on all governments, which are only created for the protection of the citizen in his person and property.

"Power to violate those rights" says Judge Leonard "would seem to be quite beyond the lawful authority of any government, and certainly the legislative department of this government cannot arbitrarily take the property of one citizen and give it to another, and of course cannot authorize others to do so" (Wells *vs.* Weston, above referred to.)

So much of the ordinance under consideration, as attempted to impose a tax upon wagons hauling into and out of the city, we think was void as not being authorized by the charter, and

in my opinion the legislature could give no authority to pass such an ordinance.

The judgment must be affirmed. Judge Wagner concurs. Judge Bliss absent.

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ELIZABETH GOODE, *et al.*, Plaintiff in Error, *vs.* JESSE MCPHERSON, *et al.*, Defendant in Error.

1. *Donations to charitable uses—Cannot be recalled.*—A Testator donated certain lands to the Methodist Episcopal Church south. A church built thereon having burned down—*Held*, that his heirs could not reclaim the lands.

Error to Adair Circuit Court.

Ellison & Ellison, for Plaintiff in Error.

If the use limited by deed expire and cannot vest, the use reverted back to the grantor who created it. (4 Kent, 298, 126, 125; 5 Pick, 528; 11 Paige, 414; 13 Ills., 465; 11 Ills., 339; 5 Gray, 17; 5 Allen, 540; 21 Peck, 215.) The congregation should have built upon the lots within a reasonable time. (2 Met., 495; 5 Peck, 528.)

Harrington & Cover, for Defendant in Error.

The deed is not conditional and the court properly declared the law.

A deed in trust and confidence is not conditional. (Bacon's Ab. Vol. 2, p. 280.)

If the title is to revert to the orginal grantor the face of the deed must show a condition to revert. (11 Ills., 336.)

The courts have always given such a construction to a deed of lands for charitable purposes, as will sustain and carry out the charitable intention. (Story's Equity Jurisprudence, 6th Edition Vol. 2, page 595, §§ 1168, 1169.)

ADAMS, Judge, delivered the opinion of the court.

This was an action to have the title to certain lots of land decreed to the plaintiffs.

The plaintiffs are heirs at laws of James C. Goode, deceased, who in A. D., 1849, conveyed to the defendants as trustees for the Methodist Episcopal Church South, and the members of such Church, the lots in dispute, in trust, to erect a church building to be used as a place of worship, to be subject to the rules and regulations of said Church South.

A house of worship was erected on the lots, but in 1862 or 1863, the house was torn down and the materials sold, and the plaintiff's claim that the trust has ceased, and that the property ought to revert to them.

As a matter of history and as an existing public fact, the Court will take judical notice, that a very large and extensive ecclesiastical body of citizens exist in this country, known as the Methodist Episcopal Church South. Their church property and other property devoted to charitable purposes belonging to them, are held in the names of trustees under deeds similar to the one under consideration. Where property has thus been donated to charitable uses, neither the donor himself, nor his heirs can ever reclaim it. Courts of equity will protect the beneficiaries as long as there are any of them in the enjoyment of the property or its proceeds, and should such beneficiaries cease to exist, the property or its proceeds will still be applied to charities of a similar nature, (see Academy of Visitation *vs.* James B. Clemens and others; 50 Mo., 167, and authorities cited.)

The ancestor of the plaintiffs when he made this deed, had no intention of ever reclaiming the property. His main purpose was the spread of the Gospel through the instrumentality of the Methodist Episcopal Church South. The erection of a church building on the lots, was considered by the donor, as a proper mode of carrying out the main design. If, however, it should become evident that a sale of the lots and an investment of the proceeds for a similar purpose would be more effectual, such conversion and appropriation ought in my judgment to be allowed.

Under no view are these plaintiffs entitled to the relief they seek.

Let the judgment be affirmed. Judge WAGNER concurs. Judge BLISS absent.

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THE TOLEDO AGRICULTURAL WORKS, Plaintiff in Error, *vs.* VINCENT HEISSER ADM. of Balzer Heuring, *et al.*, Defendants, in Error.

1. *Notes and Bills—Agency—Descriptio personae.*—A note made to "C. H. Morris, agent," is payable to him personally. The word agent after his name is merely *descriptio personae.*

Error to Scott Circuit Court.

Louis Brown, for Plaintiff in Error.

G. H. Greene and L. Houck, for Defendants in Error.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff being a corporation created under the laws of the State of Ohio, sued the defendant on the following note, to-wit:

"$170. Cape Girardeau, Mo., May 30, 1870.

On or before August 20th, 1870, we or either of us promise to pay to the order of C. H. Morris, agent, one hundred and seventy dollars for value received, negotiable and payable without defalcation or discount, and with interest from maturity, at the rate of ten per cent. per annum.

Samuel Tanner.—Balzer Heuring.

Due Aug. 20th, 1870."

The defendants denied the execution of this note to the plaintiff, or to an agent of the plaintiff, and set up that it had been fraudulently altered by adding the word "agent" to the end of the name of Morris, the payee; and set up the further defense of a judgment, on a garnishment by a creditor of Morris, for seventy odd dollars, and payment of the judgment without any notice that the plaintiff held the note; and set up a plea of tender to Morris, while the note was in his hands, of the balance due, and brought the same into court.

The plaintiff filed a general reply denying the allegations of the answer. A motion to strike out parts of the answer had been previously made and overruled.

The main question raised here, is whether this note was subject to garnishment, and whether the defendants ought to be allowed a credit for the amount of the judgment rendered against them as garnishees, which was paid.

The face of the note showed that Morris was the payee and entitled to receive the money. The word "agent," conceding that it was put there at the time of the execution of the note, was a mere *descriptio personae*, and so far as the defendants were concerned, Morris was the real owner of the note, and a garnishment of the defendants as the debtors, and a judgment rendered and paid before the note went into the hands of plaintiff, ought to be a protection to them. But whether this be so or not, it does not affect the rights of the parties here.

It was shown by inspection that this word "agent," was inserted in this note after the judgment on the garnishment had been rendered, and paid off. Under this state of facts we have no hesitation in saying that the judgment on the garnishment was a *pro tanto* payment of this note.

We see no sufficient reason for disturbing the judgment of the Circuit Court.

Judgment affirmed. The other judges concur.

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JAMES F. EDWARDS, Administrator of THOMAS B. ENGLISH, Respondent, *vs.* ANDREW GIBONEY, Appellant.

Practice, civil—Allegata and probata.—A defendant will not be permitted to set up evidence to support a defence, not set up in his answer.

Appeal from Cape Girardeau Court of Common Pleas.

L. Houck, for Appellant.

L. H. Davis, for Respondent.

ADAMS, Judge delivered the opinion of the court.

This was an action for legal services, claimed to have been rendered by the plaintiff's intestate to the defendant, in many cases, to the amount of $450. The bill of particulars sets out fees for services, commencing in 1860 and 1861; in 1864 and 1865.

The defendant denied the employment of English in any of the cases, except the suit of Verges *vs.* Giboney and pleads payment for those services. The case of Verges *vs.* Giboney occurred in 1865, as set down in the bill of particulars.

On the trial the plaintiff introduced evidence tending to show, that English had rendered services in the suits set down in the bill of particulars, as occurring in 1861, 1864 and 1865; including the Verges case in 1865, amounting in the aggregate to $250, and judgment was rendered for that amount against the defendant.

On trial the defendant offered to read the following receipt as evidence, which was excluded by the court. "$20,—Received of Andrew Giboney twenty dollars, part of fees for attention to business for him, as attorney in sundry cases. December 9th, 1863.—Thomas B. English.

The exclusion of this receipt is the only material point presented for our consideration. There was no plea of payment for any of the services claimed, except the case of Verges which occurred in 1865, long after this receipt was given. The receipt did not apply to the Verges case, as the payment had reference to services already rendered, and not to services to be rendered in future cases. On this ground it was properly excluded.

Judgment affirmed. The other judges concur.

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SIMEON C. ADAMS, *et al.*, Plaintiffs in Error, *vs.* WILLIAM C. LARRIMORE, Defendant in Error.

1. *Administrator—Failure of, to give notice of his administration—Effect of.*—The failure of an administrator to file a notice of the fact of his administering on an estate as contemplated by the statute (Wag. Stat. 122, § 13) will not invalidate his acts in the premises.

2. *Administrator--Petition of, for sale of land--Order of sale--Failure of, to specify lands to be sold--Effect of*--Where the petition of an administrator, praying for the sale of certain lands, and the appraisement set out the number, description and location of the land, and the order of sale referred to and was based upon the petition and description, the sale is not void because the order did not specify and set out the land to be sold.

Error to Audrain Circuit Court.

McFarland and Hayden, for Plaintiff in Error.

Wm. J. Howell, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This is an action of ejectment to recover lands lying in Audrain county. The ancestor of the plaintiffs in error died intestate, seized of the land in controversy, and they now claim by descent as his heirs-in-law. The defendant in error derives his title through a sale of the land made by the public administrator of Audrain county, who had charge of the testator's estate. Several objections have been taken to the proceedings of the administrator, which resulted in the sale, and which it is alleged rendered his action and the sale thereunder invalid. It is contended that the whole proceeding is void, because there is no record evidence that the county court ordered him to take charge of the estate, and that he did not file any notice of the fact of his administering in the office of the clerk of the court having probate jurisdiction. There are certain instances in which the county court may order the public administrator to take possession of an estate to prevent its being wasted or injured; and in other cases it is his duty to take charge of an estate without any order, one of which is, when money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same. (1 Wag. St., p. 122, § 8, 4th, sub-div.)

The evidence clearly shows, and there is no dispute about this fact, that this estate was left in a condition which authorized the public administrator to take possession of the same and proceed to administer thereon. The intestate died away from home; the property was in the county where he resided;

no one was there capable of taking care of it, and it was liable to deterioration and loss. But the statute further provides that it shall be the duty of every public administrator immediately upon taking charge of an estate (except where he acts under the order of the court) for the purpose of administering the same,to file a notice of the fact in the office of the clerk of the court having probate jurisdiction. (1 Wag. Stat. p. 123, § 13). If, however, he should omit to file the notice, we do not think that that would render the whole administration void. The assumption that such would be the case is founded on a misapprehension or mistake of the jurisdictional fact. The statute authorizes the public administrator to act and confers the jurisdiction independent of the notice. The notice should be filed unquestionably; but it does not give any jurisdiction, authority or power, and its omission will not invalidate the acts of the administrator.

This construction acquires additional weight by reference to the next succeeding section which declares, that if any public administrator shall fail to file the notice provided for, he shall forfeit and pay to the persons entitled to the estate, a sum not exceeding two hundred dollars, to be recovered before the court on motion, and the court may in its discretion remove such public administrator from office. [*Ibid.* § 14.]

It was obviously the intention of the statute to impose a forfeiture or penalty on the officer for failure to do his duty in regard to filing the notice, but not to invalidate his acts touching the administration.

The next point urged is, that the sale was void, for the reason that the county court in making the order did not specify and set out the land to be sold. But this position cannot be sustained. The petition praying for the sale of the land, and the appraisement, set out the numbers, description and location of the land and the order of sale referred to, and was based on the petition and description.

This I think was sufficient. The papers all formed a part of the proceedings in the cause and made the order definite and unmistakable. The court had full jurisdiction over the

subject matter, and proceeded according to law, and a mere informality could not be taken advantage of in an action of this kind. The evidence shows that the notices of sales were duly published and given; that the report of the sale was regularly approved by the court; that the purchaser paid his money and received his deed, and that in the whole matter the administrator substantially complied with the law.

We see no error in the record, and the judgment should be affirmed. Affirmed.

The other judges concur.

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STATE OF MISSOURI Plaintiff in Error, *vs.* EZEKIEL PITTS, *et al.*, Defendants in Error.

1. *Homestead—Forfeited recognizance—Execution in favor of the State.*—In case of an execution issued against the surety on a forfeited recognizance, his homestead, under the law, (Wag. Stat. 697, § 1,) is exempt, notwithstanding that the creditor is the State.

Error to Bollinger Circuit Court.

B. B. Cahoon, for Plaintiff in Error.

I. The statute of our State nowhere directs that in criminal proceedings of bail, no person shall be accepted as bail who is not possessed of property greater than the amount exempt by law from execution. (W. S. 1078, § 30.)

II. The enforcement of the homestead law in cases like the one at bar, would interfere with and retard the administration of criminal justice. Its enforcement in such cases is essential to the soverign capacity of the State, (Broom's Legal Maxims, 5th Am. Ed., § 72,) and a sound public policy requires that the State be held not subject to the operation of exemption or homestead laws, unless expressly named in such statutes.

III. A proceeding by *fieri facias* upon a forfeited recognizance is not a civil action within the meaning of the practice act, but is a mere continuation of an existing proceeding which was criminal in its nature. (State *vs.* Randolph, 22 Mo., 474.)

The statute providing for the relief of insolvents confined on criminal process (W. S. 1125) in default of the payment of any costs or fines on account of any criminal proceeding, expressly negatives the exemption of property in such cases, by providing that the person so committed shall surrender *all* his property (except the wearing apparel of himself and family) and that all the estate then or afterwards owned by such person, shall be liable to execution for the payment of such costs and expenses, (Wag. Stat. 1125, 1126, §§ 10, 13, 15.) By analogy the application is pertinent in this case.

IV. The language used by the Legislature in W. S., 697, § 1, does not embrace or apply to executions issued in the name of the State. It is a principle of universal application in the construction of Statutes, that the State will not be considered included *unless by express provision or necessary implication.* (Sedgwick on Con. & Stat. Law, p. 395, and authorities there cited; Broom's Legal Maxims, 5th Am. Ed. from 3d London Edition, § 72; Broom's Leg. Max., § 72; Chit. Pr. Crown, 366, 388; Rex. v. Copland, Hughes, 204, 203; Vin. abv. statutes, Ed. 10.)

V. The homestead act exempting property from satisfaction of debts, is a statute against common right, and must be strictly construed. (Sedg. on Con. and Stat. Law, 344, 345, 346 and 347; Rue *vs.* Alter, 5 Denio, 119; Allen *vs.* Cook, 26 Barb. 347; Alson *vs.* Nelson, 3 Min. 53.)

A. C. Ketchum, for Defendant in Error.

The land levied upon was exempt from levy and sale. G. S. 1865, Chap. 111, § 1; Spencer v. Gutman, 37 Cal.

WAGNER, Judge, delivered the opinion of the court.

The facts in this case are agreed upon, and the only question is whether the owner of a homestead can claim exemption, against an execution issued in favor of the State.

The defendant, Abernathy, was surety on a forfeited recognizance, on which the State obtained a final judgment and caused execution to be issued. He was the head of a fam-

ily, and owned one hundred and twenty acres of land on which he resided, valued at less than fifteen hundred dollars, which was acquired previous to the time the obligation accrued. When the sheriff levied on the premises, he claimed that they were exempt under the provisions of the homestead act, but they were sold, notwithstanding; and he then moved the court to set the sale aside, which motion was sustained. Had the judgment been in favor of any one other than the State, it is conceded the property would not have been liable to be sold. But it is contended, that the State is not bound by the statutory exemption concerning homesteads.

The general rule in the construction of statutes is to interpret them, so as not to embrace the sovereign power of the State or affect her rights, unless she be specially named, or it be clear by necessary implication that she was intended to be included. The Legislature in the provision of the law respecting homesteads, uses the broadest language, and exempts from attachment and executions, the homestead in all cases except as therein provided. (1 Wag. Stat. 697, § 1.) The exceptions extend to certain specified cases, but no reservation is anywhere made in favor of the State. As illustrative of the intention of the law-making power, light may be thrown on the subject by reference to analagous legislation. In the chapter on executions (1 Wag. Stat. 603, § 9), it is declared that certain enumerated personal property shall be exempt from attachment and execution, but the State is not named in the act as being bound by the exemption. Still the Legislature considered the State as being included in the same manner as an individual, for we find that in section 15, it is declared that nothing contained in this chapter shall be construed so as to exempt any property from seizure and sale for the payment of taxes due the State or any city or county thereof, showing clearly that it was the intention to include the State, and that the property may be seized by the State only in the specified instance provided for in the fifteenth section. The language employed in making the exemption, is the same in both the execution and homestead acts. The acts are on kind-

red subjects in *pari materia*, and may be construed together. They have a common object in view. In the one case it is to allow the family for their comfort and support to keep certain necessary articles, of which they cannot be deprived; and in the other to have a secure and permanent home, free from the attacks of all creditors.

From the language used in the enactment, and the history of our legislation on the subject, I think the State is included by implication, and that she does not stand in an attitude different from any other creditor.

The judgment must therefore be affirmed. Judge ADAMS concurs. Judge BLISS absent.

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RICHARD L. POWERS, Respondent, *vs.* JOHN HURMERT, Appellant.

1. *Lands—Condemnation of, for Railroads—Trepass.*—In proceedings for the condemnation of land for railroad purposes, the reception by the owner of the land of the money allowed by the commissioners on the condemnation, is not a waiver of a trepass committed by the unauthorized entry and occupancy by the agents of the road before the condemnation of the land had been perfected.

Appeal from the Adair Circuit Court.

DeFrance and Halliburton, for Appellant.

Ellison and Ellison, for Respondent.

There is no right to enter on an enclosure until the money is actually paid in. (Walther vs. Warner, 25 Mo., 277–88–9–90–91; Wag. Stat., 327, § 3.)

ADAMS, Judge, delivered the opinion of the court.

This is an action of trepass under the statute and was brought before a Justice of the Peace and taken to the Circuit Court by appeal.

In the Circuit Court the case was tried on the following agreed case: "The parties agree to the following state of facts; viz, that Richard L. Powers was the owner and possessor of the fence in controversy, surrounding the land described in

plaintiff's complaint on the—day of—, and that afterwards on the—day of—, the Quincy, Missouri and Pacific Railroad Co. filed their petition in the Adair Co. Circuit Court against the plaintiff herein and others, asking the condemnation of a strip of said land 100 feet wide, and that commissioners be appointed to condemn and assess the damages occasioned to plaintiff by such condemnation. And that plaintiff appeared to said petition and that the court appointed commissioners for said purpose, and that said commissioners on the—day of—— went on to the land and viewed the same, and that said commissioners filed their report in the office of the Circuit Clerk of Adair Co., Mo., on the—day of— and that said report of said commissioners assessed plaintiff's damages at the sum of $200, and that defendant herein is a contractor for grading under said railroad company, and that after said report was filed and before the payment of the damages assessed, the defendant herein voluntarily threw down and opened and left down and open, as is charged in plaintiff's complaint, the fence of plaintiff on said 100 feet condemned by said commissioners, in grading the road of said company, to the plaintiff's damage of the sum of $10.00 and that afterwards on 20th day of January 1872, the said company deposited said $200 with the Clerk of the Circuit Court of Adair County, Mo., and that afterwards on the—day of January, 1872, the plaintiff herein received said sum of money and gave receipt therefor."

The Circuit Court on this statement gave judgment for the plaintiff.

The only question presented is whether the agreed case warrants the judgment. It is contended that the reception of the money allowed by the commissioners on the condemnation of the property was a waiver of the alleged trepass. It is agreed that the trespass was committed and the liability incurred before the condemation was perfected by the payment of the money. It may be remarked that the taking of private property for public use is in the nature of a forced sale. The owner is compelled to part with his property at the price assessed. The whole proceeding is *in invitum* and he is forced

to take the assessed price, *nolens volens.* So in accepting the price which is forced on him he agrees to nothing, and waives no previous right that may have accrued to him, nor does the condemnation relate back so as to justify a previous trespass. Relation is sometimes allowed to prevent injustice, as when an attachment has been issued and levied without sufficient affidavit, and an amended affidavit is afterwards made it will relate back, so as to uphold the attachment and justify the previous levy. But, in that case the right to the attachment and its levy existed at the time and only lacked the formality of a sufficient affidavit. The right to invade the plaintiff's property had no existence till the condemnation was complete by payment of the assessed price. See Walther vs. Warner, 25 Mo., 277.

Judgment affirmed. Judge Wagner concurs. Judge Bliss absent.

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JAMES MARSHAL, Defendant in Error, *vs.* ST. LOUIS AND IRON MOUNTAIN R. R. Co., Plaintiff in Error.

1. *Railroads—Fences erected along line of road within railroad lands—Construction of statute.*—Under the act touching railroad companies (Wag. Stat. 310, § 43,) a railroad corporation is liable to an adjoining owner for fences erected by him in pursuance of that section, notwithstanding the fact that such fences were erected nearer the track than the outer boundary of the land belonging to the road. Such an erection without other acts amounting to a claim of ownership, would not constitute an appropriation of the company's land outside the fence.

Error to Madison Circuit Court.

Dryden & Dryden, for Plaintiff in Error.

If the adjacent land owner may take two feet of the corporation's land by setting his fence off the line, he may take ten or any greater number of feet, or, if it does not operate as a robbery of the corporation of its land, it will at least impose upon it the burden of moving back or moving out a fence it has been compelled to pay for, to its line, in order to save its land for use, and from the operation of the statute of limitations.

Clardy & Duchouquette, for Defendant in Error.

Plaintiff was not bound to put the fence or any part of it on his own land, he was only bound to place the same as near the line dividing his own land from the company's, as practicable, and this was done.

The evidence showed that the timber and materials furnished by Marshal were taken and used by the company's employees and agents in the construction of cattle guards or gaps, and the law implies a promise to pay the reasonable value thereof.

Adams, Judge, delivered the opinion of the court.

This was an action to recover the value of a fence under the provisions of section 43, of the second article of the corporation law, (W. S. 310.)

That section provides that it shall be the duty of railroad companies to erect and maintain good and substantial fences, on the sides of the road where the same passes through, along or adjoining inclosed or cultivated fields, or uninclosed prairie lands, of the height of at least five feet, &c., &c. It further provides that until such fence shall be duly made and maintained, such corporation shall be liable in double the amount for all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals escaping from or coming upon said lands, fields or enclosures, occasioned by the failure to construct or maintain such fences, &c.

If the corporation after the completion of its road through such lands, fails or refuses to erect or maintain such fences, &c., for three months, it is provided that the owner or proprietor of the adjoining lands may erect and maintain such fence, &c., and recover from such corporation in any court of competent jurisdiction the full value of such fence. It is further provided, that after such fence is erected and maintained the corporation shall only be liable for damages negligently or wilfully done.

The evidence showed that the fence in question was not ex-

actly on the line of the road, but was on the company's land near the dividing line separating the road from the adjacent lands.

The objection urged to the plaintiff's right of recovery, is that he did not erect the fence precisely on the dividing line between the railroad and his own lands. The statute requires such fences to be erected and maintained on the sides of the railroad. Does the word "sides" in this connection mean the dividing lines between the road and the adjacent lands? Under the statute a railroad may be laid out not exceeding one hundred feet in width. This width with the length constitutes the entire road. But the road itself consists of several parts, the road beds or tracks for the cars, and the unoccupied sides or spaces on either side of the tracks. The main object of the statute under consideration, was to prevent animals from being injured, by erecting a barrier along the road so as to keep them off the track, and to keep them from escaping from or into the adjacent lands. Would not the corporation be allowed to do this by erecting and maintaining fences on the unoccupied spaces between the tracks or road beds proper and the outer lines of the road? or must the corporation to bring itself within the statute, erect such fence on the dividing lines between the road and the adjacent lands?

It is evident to my mind that such fences erected and maintained on the vacant spaces referred to would be a strict compliance with the statute. The sides of the road in my judgment mean the vacant spaces referred to. The road bed or tracks may be looked upon as the central part and the vacant spaces as the sides of the road. It might be better for all parties if the fences should be put on the outer lines. If they were so placed the adjacent proprietor might join fences, otherwise he could not do so without the permission of the company.

When the company fails or refuses to erect and maintain such fences within the time prescribed by the statute, the adjacent proprietor may do so and recover the value, and the fences so to be erected may be put on the sides or vacant spaces referred to.

The objection that a fence thus placed would be an appropriation of the company's land outside of the fence is not tenable. By occupying a part of the entire road with tracks, &c., and claiming the whole, the company would be considered as in possession of the entire width. The adjacent proprietor could only assume possession by joining his fence to that of the company. This he could not do where the fence was not on the line, without committing a trepass. Nor could he appropriate or cultivate any part of the road outside of the fence without the consent of the company.

Tne judgment was for the right party. Let it be affirmed. Judge WAGNER concurs. Judge BLISS absent.

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STATE OF MISSOURI, Respondent, *vs.* WILLIAM FLENTGE, Appellant.

1. *Practice—Supreme Court—Exceptions, etc.*—The Supreme Court will not examine law points not raised by instruction or exception in the court below.

Appeal from Cape Girardeau Circuit Court.

L. Houck, for Appellant.

Lewis Brown, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an indictment against the defendant, who is County Clerk of Cape Girardeau County, for a misdemeanor in Office, in failing to extend the school taxes on his books, as to a number of tax-payers, and also for failing to deliver to the collector a certified copy of the tax books within the time prescribed by law. The trial was before the court without the intervention of a jury, and after hearing the evidence, the court fined the defendant one dollar; from which judgment he appealed.

No point of law was raised on the trial, and no instructions were asked for, or given, on either side; the whole case was decided upon the evidence adduced.

That the defendant was in default was clearly proven, but he offered evidence in exculpation, to show the reasons why the law was not fully complied with. After examining the

evidence, we do not think it presents a state of facts which would justify us in overruling the finding of the court below. We see no error in overruling defendants' motion in arrest. The indictment was sufficient.

Judgment affirmed. The other judges concur.

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PACIFIC RAILROAD COMPANY, Respondent, *vs.* CONSTANTINE MAGUIRE, Appellant.

1. *Railways—Mo. Pacific, ordinance 1865, imposing tax on road—Act Feb. 10, 1864, etc., not a contract limiting taxing power*—The Pacific Railroad Company of Missouri is not exempt from the tax of ten or fifteen per cent. imposed upon it by the ordinance of April 8th, 1865, (Gen. Stat. 1865, p. 52.) Nor does the act of Feb. 10, 1864, (Ses. Acts 1863-4, p. 50) amount to such a contract, as limits the right of the State to impose the tax. (North Mo. R. R. Co. v. Maguire, 49 Mo., 490, affirmed).*

Appeal from St. Charles Circuit Court.

Rombauer for Appellant.

Leighton, for Respondent.

WAGNER, Judge, delivered the opinion of the Court.

This case was argued in connection with the case of the North Missouri Railroad Company vs. Maguire, and the questions arising in both cases are essentially the same. It is unnecessary to notice the provisions of the charter, or the subsequent acts passed by the legislature in relation to the company, as this case must turn on the construction of the act of February 10, 1864. At that time the State, then holding a first mortgage to secure the amount advanced "on the road of the company and every part and section thereof and its appurtenances" passed an act entitled "an act for the extension and completion of the Pacific railroad to the western boundary of the State, at Kansas City; and the North Missouri railroad to the Iowa state line; to complete the Southwest branch of the Pacific railroad; and to reduce the state indebtedness."

The act authorized the Pacific railroad company to issue

*This case was decided at the March term of 1872, and properly belongs in vol. 50

not more than 1,500 bonds of $1,000 each, bearing interest of not more than seven per cent. per annum, and having four, five and six years to run, in equal proportions. These bonds were to be secured by first mortgage on the main line of the road west of Dresden; and to enable them so to be secured, the state, for this object and to this amount and extent only, relinquished her first lien and mortgage on that part of the road lying west of Dresden, to the amount of bonds actually negotiated, reserving, however, a second lien or mortgage on that part of the road, and retaining its first lien on the residue.

The act provides for the appointment of a fund commissioner, who was to negotiate the bonds, and to whom the company should from day to day pay over all of its gross earnings and daily receipts, and who should pay over the funds so received upon vouchers of the chief engineer or superintendent, certified by the president of the company, for operating the road and carrying on the ordinary business of the corporation.

The act further provided that the fund commissioner should apply the net earnings of the road, first, to the payment of his salary, next, to the extension and equipment of the road until completed, reserving sufficient for the payment of the interest accruing semi-annually on the bonds actually sold, and after the completion of the road, any surplus over the accruing interest, to the purchase of the bonds themselves; second, to the payment of interest, as the same should become due and payable, on the first mortgage bonds, exchanged for state bonds under the provisions of the act; third, to the payment of dividends not exceeding six per cent. per annum, on preferred stock, created under the law, by an exchange of state bonds for stock; fourth the surplus, if any, to the purchase of the residue of the state bonds.

The provisions of the act were to be accepted and, were accepted, and it then became, by its terms, of full force and binding effect upon the corporation and the state.

The plaintiffs now claim that the amount required to be

collected by the ordinance is illegal, because not within the exercise of the taxing power; and, secondly, that the act of February 10th, 1864, constituted a contract between the company and the state, and that the ordinance violates that contract by seeking to change the order of distribution at the time of the passage of the act above referred to. We have been unable to find any provision in the charter of the company exempting it from taxation, and we do not think that the act amounted to a contract limiting the right of the State to impose a tax.

There is no difference, in principle, between this case and the North Missouri Railroad Company vs. Maguire, just decided, and for the reasons therein given, the judgment must be reversed.

Judge Bliss concurs. Judge Adams was not on the bench when this case was argued.

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CAPE GIRARDEAU UNION MILL COMPANY, Plaintiff in Error, *vs.* CHARLES BRUIHL, Defendant in Error.

1. *Practice, civil—Jury—Evidence.*—In civil law cases it is for the jury to determine the weight of evidence.

Error to Cape Girardeau Court of Common Pleas.

L. Houck, for Plaintiff in Error.

G. H. Greene, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff brought its action against the defendant, to recover a certain amount of money it had deposited with him for the purpose of buying wheat; and also the value of a lot of sacks, which it was alleged were placed in his care and never returned.

The defence was, that the defendant kept the money in a good and sufficient iron safe, with his own money; and that on a

specified day in the night time, his store was broken open, entered and burned, and the safe was broken open and the money stolen, with the money and other valuables of the defendant. And, as to the sacks, the defendant pleaded that after he had received them they were placed in his ware house, with his own goods, and that when his store was destroyed by fire, the sacks remaining in his possession were also destroyed; and that the money was lost and the sacks burned without any carelessness, negligence or fault on his part.

There was a trial before a jury who found a verdict for the defendant, upon which judgment was rendered.

There was abundant evidence to support the verdict. The only evidence given for the plaintiff, was of a negative character, and it was for the jury to determine the weight of the evidence, and we will not review their finding.

The instructions submitted the case fairly, and in as favorable a light for the plaintiff, as it could have asked.

Under the instructions, the jury must have found that the defence set up in the answer, was true in every particular, and if so, defendant was not liable.

Judgment affirmed. The other judges concur.

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NATHANIEL HIGHLEY, Respondent, *vs.* MARY A. NOELL, Appellant.

Practice, civil—Demurrer, waiver, etc.—A party failing to except on demurrer overruled, and answering over, cannot afterward raise the points involved in the demurrer, before the Supreme Court.

Appeal from Perry Circuit Court.

J. W. Nicholson, for Appellant.

Robinson & Clardy, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The objection urged by the counsel for the appellant in his brief to the petition, and the action of the court in refusing

to have a jury empaneled on the trial, are not available. The petition contained two counts; the first was in the nature of a declaration at law for money had and received, and asked for judgment for the sum alleged to be due; the second count was equitable in its character, but did not conclude with a prayer for any relief.

On the trial no attention was paid to the count in equity, but the petition was treated as an action at law, and judgment given on the first court only. Undoubtedly the defendant had the right to demand a jury, and the refusal of the court to comply with the request would have been good ground for reversal, had not the point been expressly waived by an agreement filed in the cause. The error of the court in refusing defendant a jury is explicitly waived, and therefore it will not be further noticed. A demurrer was interposed to the petition, and also a motion to strike out a part of the same, both of which were overruled. But as no exceptions were taken to the ruling of the court, and the defendant thereafter filed an answer, there is no point saved in that regard for revision. The petition was good enough as a common law declaration, and certainly sufficient after verdict.

The evidence was admissible. The contents of the letters proved, showed that the proper diligence had been made in searching for the original, and that they were lost and could not be found.

It was entirely competent to show by parol evidence the real object and purpose of the assignment, and to whom the money rightfully belonged.

There does not appear to be any substantial error in the record and the judgment will be affirmed.

Judge Adams concurs. Judge Bliss absent.

STATE OF MISSOURI, Respondent, *vs.* JESSE GABHART, Appellant.

1. *Practice—Supreme Court—No appeal etc.*—Where the record of a case brought up from a lower court shows no allowance of an appeal or writ of error, it will be stricken from the docket.

Appeal from Wayne Circuit Court.

Chapman, for Appellant.

Attorney-General Baker and *G. H. Crumb*, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This is an indictment for burglary and larceny. From the record it appears the defendant plead guilty and was sentenced to three years imprisonment in the penitentiary. The case is on the docket as an appeal from Wayne Circuit Court. But the record does not show that any appeal was applied for or allowed, and there being no writ of error, the case is here without any authority and must be struck from the docket.

Judge Wagner concurs. Judge Bliss absent.

—o—

ELISHA LAUNIUS, Defendant in Error, *vs.* WILLIAM C. COLE, Plaintiff in Error.

1. *Practice, civil—Appeal—Affidavit—Informality of*—An affidavit for appeal is not invalidated from the fact that the signature of deponent was through mistake placed below the *jurat* instead of being in its proper place.

Error to Stoddard Circuit Court.

E. S. McKeon, for Plaintiff in Error.

WAGNER, Judge, delivered the opinion of the court.

The record in this cause is very imperfect and it is not easy to see the exact grounds on which the court predicated its judgment.

It was an appeal from a justice of the peace, and the appeal was dismissed for certain reasons stated in the motion of the respondent. But the bill of exceptions states that the appeal was dismissed for want of an affidavit. If this was the sole ground for dismissal, the court undoubtedly erred, as there is nothing alleged against the affidavit but a mere informality. The affidavit was duly signed by the appellant but by inadvertance or mistake his signature was placed below the *jurat* instead of its proper place, but this was no cause for treating it as a nullity.

Besides, pending the motion for dismissal the appellant offered to file a new affidavit, which the court refused to allow.

The statute declares that no appeal from a justice's court shall be dismissed for want of an affidavit, if the appellant or some person for him will file in the appellant court the affidavit required by law before motion to dismiss is determined. (2 W. S. 848, § 7.)

The judgment will be reversed, and the cause remanded. Judge Adams concurs. Judge Bliss absent.

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JAMES G. TATUM, Defendant in Error, *vs.* JOHN BROOKER, Plaintiff in Error.

1. *Statute of fraud—Mem. in writing—Part performance.*—Where the vendee of real estate took possession and worked the property as his own under the contract of purchase, and appropriated the proceeds to his own use, he would be bound for the purchase money without the necessity of any writing. There would in that case be such part performance as to take it out of the statute of frauds.

Error to St. Charles Circuit Court.

E. A. Lewis, for Plaintiff in Error.

King & McDearmon, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff sued for the purchase money of a gold mining claim in Montana Territory, which he alleged he sold to the

defendant for the price of seven hundred dollars in gold dust, claiming the value thereof to be one thousand and fifteen dollars, for which he asked judgment.

The defendant denied the sale and all the allegations in plaintiff's petition. The case was tried before the court sitting as a jury. The testimony was conflicting as to the character of the sale. For the plaintiff it was maintained that the sale was absolute, while the defendant endeavored to show that it was conditioned on the production of the amount of the price out of the mine, and this being found hopeless the sale was mutually released and abandoned by the parties.

No deed or other instrument of writing was executed by either party, but defendant was put into possession of the mine under the contract of sale, and worked it for a length of time as his own, obtaining ore therefrom, but not in paying quantities. It was also in evidence that the defendant paid the plaintiff thirty-five dollars of the purchase money.

The plaintiff undertook to prove by witness, not being professional experts nor having held official position in Montana, that by the custom among the miners in that Territory, no deed was necessary to transfer a mining claim; that "it was not considered real estate." The defendant objected to this testimony as not being the proper method of proving the laws of the Territory.

The defendant prayed the court for an instruction to the effect, that if there was no note or memorandum in writing of the alleged sale, signed by the defendant or some one by him thereto lawfully authorized, the plaintiff could not recover. This instruction was refused and the defendant excepted.

The point mainly relied on here for reversal, is the refusal of this instruction.

For the purpose of this case it may be conceded that a mining claim in Montana is real estate, and that the statute of frauds was in full force in that territory when this contract was made. In my judgment the evidence shows a sufficient part performance to take the case out of the statute. The defendant took possession and worked the mine as his own under

the contract of purchase, and appropriated the proceeds of the mine to his own use and paid part of the purchase money.

It has never been held in this State, that a vendee must sign a note or memorandum in writing in order to bind him to pay the purchase money. His verbal promise to pay the purchase money is binding if supported by a sufficient consideration, and the contract of sale be signed by the vendor alone, or there be such part performance as to take it out of the statute of frauds.

The question whether the plaintiff ought to have been permitted to recover without first making or tendering a deed, was not relied on as a defense and need not be discussed here.

As the contract was taken out of the statute of frauds by part performance, it is unnecessary to pass upon the competency of the witnesses introduced to prove the laws of Montana. Whether the statute of frauds was in force there or not under the view taken of this case, the judgment was for the right party.

Judgment affirmed. Judge Wagner concurs. Judge Bliss absent.

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THOMAS M. WANNALL, Appellant, *vs.* SAMUEL KEM *et al.*, Respondent.

1. *Acknowledgment—Defective—Equity will not interfere to correct.*—Where a notary fails to set forth in a certificate of acknowledgment, the facts necessary to constitute a good certificate, he may correct his certificate if the facts will warrant him in so doing, and he may be compelled so to do by *mandamus*. But a court of equity has no jurisdiction to correct such mistakes.

Appeal from Lousiana Court of Common Pleas.

McDonald, Caldwell & Biggs, and Kinealy, for Appellant, cited Stephens *vs.* Montgomery, 20 Ark. 373; Carney *vs.* Hopple, 17 Ohio State, 46.

Fagg & Dyer, for Respondents cited Chauvin *vs.* Wagner, 18 Mo., 531.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in equity to foreclose a mortgage executed by the defendants Kem and wife, on land belonging to the wife in fee, to secure a note alleged to have been executed by Kem and wife to the plaintiff's indorser. The mortgage is dated the 18th of January, 1869, and was acknowledged before the defendant A. L. Loucks as notary public. The acknowledgment was properly made, but the notary public failed to state in his certificate of acknowledgment the facts necessary to constitute a good acknowledgment by husband and wife to a conveyance of the wife's lands. The notary is made a party defendant to this suit, and a decree is asked correcting the omissions of the notary in his certificate of acknowledgment, and for a foreclosure and sale of the mortgaged premises.

The defendants, Kem and wife, demurred to the plaintiff's petition upon the ground that it did not state facts sufficient to constitute a cause of action, and that the notary was not a proper or necessary party to this suit.

This demurrer was sustained, and a final judgment was rendered on the demurrer for the defendants.

1st. It is essential to the validity of a mortgage or conveyance by husband and wife of the wife's lands that such conveyance should be acknowledged in conformity with our statutory requisitions on this subject, and that the certificate of the officer taking the acknowledgment should substantially state all the facts necessary to such acknowledgment. If the officer fails to set forth in his certificate the facts necessary to constitute a good acknowledgment, a court of equity is not the proper forum to afford the relief. The officer may voluntarily correct his certificate, or make out a proper certificate where he has given a defective one, if the facts really exist to warrant such action. If the officer refuses to make a proper certificate, he may be compelled to do so by *mandamus*; but a court of equity has no jurisdiction to correct such defects. The notary derives his authority to take acknowledgments from the statute, and courts of equity do not aid the defective execution of statutory powers. (Chauvin vs. Wagner, 18

Mo., 531; Moreau vs. Detchmendy, 18 Mo., 522; Bright vs. Boyd, 1 Story R. 486, and 1 Story's Eq., § 97-177.)

2d. Under our statutes a husband, during coverture, can make no conveyance of his interest in his wife's real estate unless it be by deed executed by the wife jointly with the husband, and acknowledged by her in the manner provided by law in the case of the conveyance by husband and wife of the real estate of the wife. (W. S. 935, § 14.) So in this case, the mortgage being inoperative as to the wife for want of a proper certificate of acknowledgment, was also inoperative as to the husband.

Let the judgment be affirmed. The other Judges concur.

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RICHARD L. POWERS, Respondent, *vs.* JOHN HURMERT, Appellant.

Powers v. Hurmert *ante*, page 136, affirmed.

Appeal from Adair Circuit Court.

De France & Halliburton, for Appellant.

Ellison & Ellison, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action of trespass. The facts and questions involved are the same as in the case of Powers vs. Hurmert, decided at this term, and must be disposed of in the same way.

Judgment affirmed. Judge Wagner concurs. Judge Bliss absent.

JOHN BUTTON, Respondent *vs.* HANNIBAL AND ST. JOSEPH RAILROAD CO., Appellant.

1. *Justice's Court—Appeal—Security for Costs—Non-residence.*—On appeal from a justice, appellant asked that respondent be ruled to give security for costs, on the ground that he had, pending the appeal, become a non-resident Rule not granted. (Wag. Stat. 342, 343.)

Appeal from Shelby Circuit Court.

Carr, for Appellant.

C. S. Brown & J. T. Smith, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff sued the defendant before a justice of the peace.

The complaint was that the defendant had killed plaintiff's milch cow, worth forty dollars.

The plaintiff had a judgment before the justice, from which the defendant appealed to the Circuit Court. The defendant filed a motion in the Circuit Court to rule the plaintiff to give security for costs, upon the ground that since the judgment before the justice the plaintiff had become a non-resident of the State. This motion was overruled, and this action of the court is assigned for error. This point is settled in favor of the plaintiff by the 3d section of chapter 173 General Statutes, page 687, which reads that "On an appeal from a justice's court if the plaintiff be appellee he shall not be required to give security for costs."

After the case had been transferred to the circuit court, the plaintiff was allowed to amend his statement, specifically charging the defendant with negligence in killing his cow. The substance of the charge before the justice was precisely the same thing. The cause of action in the justice's court was essentially the same as the one tried in the Circuit Court. The amendment did not set up a new or different cause of action. I see no error in the record.

Let the judgment be affirmed. The other judges concur.

GIDEON HOWELL, Defendant in Error, *vs.* REYNOLDS COUNTY, Plaintiff in Error.

1 *Practice, civil—Verdict—County warrants—Statute of jeofails, etc.*—In a suit upon county warrants, the omission in the petition of an allegation that there were funds in the county treasury out of which the warrants might have been paid, will not, after verdict, impair the judgment, but will be supplied by the court in aid of the verdict. (W. S., 1036, § 19.)

2. *Practice, civil—Replication—Failure to file—Objection on ground of—Verdict.*—After trial ended and verdict rendered, as though a replication had been in fact filed, it would be too late to raise the objection that such pleading had been omitted.

Error to Wayne Circuit Court.

J. R. Arnold, for Plaintiff in Error.

I. To the allegations of the answer there was no reply, and it stands confessed that the warrants were obtained by fraud and in violation of law, and that no consideration was paid therefor. (Gen. Stat. 1865, p. 661, § 36; Robards vs. Munson, 20 Mo., 65; Ennis vs. Hogan, 47 Mo., 513.)

II. The officers of a county are part of the State government, with specific power and duties generally local to the county, and, in liquidating the demands against the county, this court should not compel County Courts to pay off their warrants in any other order than that pointed out by statute. (G. S., 1865, p. 227, § 8; Barton County vs. Walser, 47 Mo., 201.)

III. The petition does not state facts sufficient to constitute a cause of action. It should have averred that all prior warrants issued by the County Court of said county and presented for payment had been paid, or that the treasurer had set apart money for the payment of warrants previously presented on the fund the warrants in suit are drawn on, and that the treasurer had the money belonging to the fund the warrants in suit were drawn on, sufficient to pay the same, and refused to pay, etc.

IV. The errors complained of arise on the face of the record and should be acted on by this court, although there was no

motion in arrest of judgment. (Collins vs. Sanders, 46 Mo., 389; State vs. Marshall, 36 Mo., 400; Jones vs. Tuller, 38 Mo., 366.)

Whittelsey, for Defendant in Error.

I. The defendant was entitled, if no reply was actually filed, to a judgment of *non pros* for failure to reply, and that he waived. (W. S., p. 1053 § 6; Smith & Wife vs. City of St. Joseph, 45 Mo., 449, 450; Henslee vs. Cannefax, 49 Mo., 295.)

II. If no reply was actually filed the defendant by proceeding to try the issues without asking for a judgment of *non pros*, or to take the answer as confessed, waived the defect, and having also failed to move for a new trial or in arrest of judgment, or to tender a bill of exceptions, he must be held as having waived any defect in the pleadings, which did not show a want of jurisdiction or a statement of facts sufficient to constitute a a cause of action, or that upon the whole record the plaintiff was not entitled to recover. (2 W. S., p. 1015; Smith vs. City of St. Joseph, 45 Mo., 450; McClurg vs. Hurst, 37 Mo., 144.) The defendant failed to move for judgment on the pleadings as he should have done. (Henslee vs. Cannefax, 49 Mo., 295.)

III. The defendant failed to give the Circuit Court the opportunity of correcting any error it committed by moving for a new trial or in arrest of judgment. (2 W. S., p. 1068, § 39.) The error, if it be one, is noted first in this Court.

IV. The judgment was for the right party, (2 W. S., p. 1068, § 40), and the error was immaterial. (Miller vs. Graham, 41 Mo., 509; Morgner vs. Kester, 42 Mo., 466; Whit. Prac. 517.)

Adams, Judge, delivered the opinion of the court.

This was an action on several county warrants drawn on funds appropriated to county expenditures.

The answer denied that the warrants were for any valuable consideration, and set up that they were obtained by false and fraudulent representations.

The record does not show that there was any replication to the answer, but the case was submitted to the court and tried as though there had been a replication, and a verdict and judgment was rendered for the plaintiff for the amount of the warrants.

There was no motion in arrest or for a new trial, and no bill of exceptions. The case is here simply upon the record. The suit was originally brought in the Reynolds Circuit Court and taken by a change of venue to Wayne Circuit Court.

The petition was defective in not stating that there were funds in the treasury out of which the warrants might have been paid, and that the treasurer refused to pay them out of such funds. But after a verdict has been rendered, such omissions are not allowed to stay or impair the judgment, but will be supplied by the court in favor of the verdict. (See § 19, 2 W. S., 1036.) If the verdict had been against the plaintiff and he was here trying to set it aside, it might be held that on account of such omissions the verdict was for the right party, although errors in other respects might have been committed. The omissions referred to are allowed to be supplied in support of the finding and judgment.

In regard to the want of a replication, the proper time to have taken advantage of it was by a motion to *non pros* the plaintiff, or upon the trial to have asked that the allegations might be taken as true. (See 2 W. S., 1053, § 6; 2 W. S., 1019, § 36.) If however such motions had been made, the court in furtherance of justice would have permitted a replication to be filed instanter. After trial and verdict as though the replication was in, it is too late to make the objection, nor can such objection be made for the first time in this court to impair a verdict and judgment. Smith and Wife vs. City of Joseph, 45 Mo., 449; Henslee vs. Cannefax, 49 Mo., 295.

I have examined the record and find no sufficient error to warrant us in interfering with the judgment.

Judgment affirmed. Judge Wagner concurs. Judge Bliss absent.

JAMES D. MOORE, SR., Appellant, *vs.* HENRY F. PIEPER, Respondent.

Juries—Evidence—Witnesses.—Juries are the proper judges of the weight of evidence and the credibility of witnesses.

Appeal from St. Charles Circuit Court.

E. A. Lewis, for Appellant.

Wm. A. Alexander, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff sued defendant for breach of warranty in the sale of a reaping and mowing machine. The evidence was contradictory in regard to the terms of the sale, but the credit which should be properly given to the respective witnesses was exclusively for the jury to determine.

All the instructions asked for by the plaintiff were given, and the court of its own motion gave one instruction, which is the principal matter complained of. That instruction told the jury that to entitle the plaintiff to recover, it should appear to their satisfaction that according to the contract of sale, the defendant was to take back the machine and refund the amount advanced, if the machine failed in regard to the matters understood and agreed upon by the parties at the time of the sale, and that the machine after a fair trial failed as to such matters, or, that the defendant afterwards took back the machine and abrogated the contract of sale.

This instruction though obnoxious to some verbal criticism, when applied to the evidence is not seriously objectionable.

There was evidence, tending to prove that when the contract was made and the machine purchased, the agreement and understanding was that it was to do good work, and if it did not operate well, the defendant was to be notified and to be allowed to put it in good order, and if it did not then work, he should take it back. The notice was given and the defendant went to plaintiff's premises to comply with his undertaking, but the plaintiff who had procured another machine

refused to let him make the necessary repairs or test its capacity. The defendant also testified that he only received the machine back as the property of the plaintiff, and that what he subsequently sold of it worked well. The instruction was predicated on this evidence; the jury were the proper judges of the weight of evidence and the credibility of witnesses, and we therefore see no reason for interference.

Judgment affirmed. Judge Adams concurs. Judge Bliss absent.

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S. Q. Page, Defendant in Error, *vs.* James R. Arnold, Plaintiff in Error.

1. *Action for Purchase Money—Special Verdict—Specific Performance—Judgment for, may be corrected, when.*—In suit by the vendor of certain lands, against the vendee thereof for a portion of the purchase money, plaintiff prayed for a decree ordering defendant to pay a portion of the amount to a third party. A special verdict and judgment were rendered accordingly. *Held*, that the suit was purely a legal one and not an action for specific performance. But that the error was an informal one and might be corrected on application to the court, by the substitution in place of the special decree, of a general judgment for the amount ascertained by the verdict.

Error to Washington Circuit Court.

J. Bush, for Plaintiff in Error.

Adams, Judge, delivered the opinion of the court.

This was a suit for the balance of purchase money for a tract of land sold and conveyed by the plaintiff to the defendant.

The agreement between the parties was that the defendant, in payment of the price for the land, should pay off the plaintiff's indebtedness to Washington county, which was understood to be three hundred dollars, more or less. There was a mortgage covering one of the notes due to the county, and the other had been left out by mistake.

The defendant denied that he was to pay any but the mortgage debts.

The case was submitted to the court, and the court after hearing all the evidence, found a special verdict in favor of the plaintiff for the amount of the note and interest not included in the mortgage, and found, also, that judgment had been rendered on said last mentioned note in favor of the county against the plaintiff and his securities on the note and for costs. The court upon this finding gave judgment that the defendant should pay the county of Washington the amount of the judgment so recovered by the county. There were no instructions asked or given on either side, and the defendant has brought the case here asking this court to review the evidence and finding of the court below.

Although the plaintiff asked for the specific relief given by the court, yet the court might, under the allegations and proof and on the special verdict, have rendered a general judgment of recovery in favor of the plaintiff for the amount of damages he was entitled to, as ascertained by the verdict.

The action was purely legal and was not a case for specific performance, and the judgment, therefore, for specific performance was informal.

But it was such an informality as might be corrected on application to the court below, and such as will be corrected by this court, by ordering the entry of such judgment on the verdict as should have been rendered by the Circuit Court.

The verdict is amply supported by the evidence and cannot be disturbed by us. It is therefore ordered that the judgment as rendered be set aside, and that judgment be rendered in this court in favor of the plaintiff against the defendant for the amount found by the special verdict, and for costs in both courts.

Judge Wagner concurs. Judge Bliss absent.

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W. B. Morris, Adm'r, &c., Respondent, *vs.* David Thomas, *et al.*, Appellant.

1. Whaley vs. Whaley, *ante*, p. 36, affirmed.

Appeal from St. Louis Circuit Court.

J. Q. A. Frictchey, for Appellant.

E. B. Shersen, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The precise question presented in this case was decided at the present term in the case of Whaley vs. Whaley. The only point raised, is, as to who is entitled to the emblements or growing crops on the farm of a deceased person at the time of his death, the administrator or the widow, and the question must now be regarded as settled in favor of the administrator.

Judgment affirmed. Judge Adams concurs. Judge Bliss absent.

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STATE OF MISSOURI, Defendant in Error, *vs.* PATRICK MCCANON, Plaintiff in Error.

1. *Criminal law—Dying declarations—When admissible as evidence.*—In order to render dying declarations admissible in evidence, it must appear that the person making them was under the belief that his dissolution was near at hand, and that he had abandoned all hope of recovery. (State vs. Simon, 50 Mo., 370, affirmed.)
2. *Practice, criminal—Instructions—Dying declarations—Credit to be attached to, to be determined by the jury.*—An instruction in a murder trial, that the dying declarations of the person killed as to the circumstances which produced his death, should receive the same credit as his testimony if taken under oath, would be erroneous. The only province of the court is to determine the admissibility of such declarations. The degree of credit to be attached to them should be left to the jury to determine.

Error to Washington Circuit Court.

L. F. Denning, for Plaintiff in Error, cited in argument: Rex. vs. Crocket, 4 Carr. & Payne, 544; Rex vs. Van Butchell, 3 Carr.& Payne, 631; State vs. Poll., 1 Hawks, 442; Moore vs. Commonwealth, 2 Leigh, 706; Smith vs. State, 9 Humph., 24; Rex. vs. Murphy, 1 Irish. Cri., 38; Rex vs. Errington, 2 Lewin Crown Cas. 148; 1 Greenl. Ev. § 158.

J. L. Thomas and Reynolds & Relfe, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

The accused, in conjunction with others, was indicted for the murder of one Herrington, and was convicted of murder in the second degree.

The material question upon the trial was whether the defendant was present, aiding and assisting in the commission of the offence.

A statement of the murdered man made previous to his death, showing that the defendant was present and took part in the crime, was admitted as a dying declaration.

The defendant objected to the admission of this testimony, because no proper foundation had been laid to authorize it.

It was not shown that the deceased had any immediate apprehension of dying, but, on the contrary, he expressed strong hopes of recovering.

The question of the admissibility of dying declarations was recently before this court in the case of the State vs. Simon, (50 Mo., 370, 1872.)and we there held that in order to render such declarations admissible in evidence, it must appear that the party making them was under the belief that his dissolution was near at hand, and that he had abandoned all hope of recovery. From this it follows that the court erred in permitting the declaration to be received in evidence.

There was other evidence, going to establish the same fact, and tending to show that the accused was present, and aiding in the commission of the crime; but, as we cannot tell what weight the jury gave to the illegal evidence, the cause must be reversed.

We see no other objection to the ruling of the court in the matter of admitting or rejecting testimony.

The instructions given by the court presented the law of the case to the jury justly and fairly, and are unobjectionable with one exception. An instruction was given to the effect that the dying declarations of a person who had been killed, if made with regard to the circumstances which produced his death, are to be received with the same degree of credit as

the testimony of the deceased would be, if examined under oath as a witness. This instruction was erroneous.

The court had no right to comment upon the evidence. Its only province was to determine its admissibility, and then leave the credit or weight which should be attached to it, to the jury. We have perceived no other errors in the record. But for those above noticed, the judgment will be reversed, and the cause remanded.

Judge Adams concurs. Judge Bliss absent.

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JOHN C. CASTLIO, *et al.*, Defendant in Error, *vs.* GREENBURY BISHOP, Plaintiff in Error.

1. *Judgment by default—Diligence—Meritorious defence*—A judgment by default regularly rendered, will not be set aside unless due diligence be shown, and an affidavit of a good and meritorious defence be filed.

Error to St. Charles Circuit Court.

E. A. Lewis, for Plaintiff in Error.

T. Bruere, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

This case comes up on a question of practice. It was an action of ejectment. After one or two amended answers had been filed the plaintiff took leave to amend his petition, and filed an amended petition in vacation, which was occasioned by the adjournment of the same term to another day. At the meeting of the Court after this adjournment, the case by consent was continued till the next term. At the next term there being no answer filed, the plaintiff filed a motion for judgment for want of answer, which was taken up the next day and sustained, and a judgment for want of answer rendered and afterwards made final.

The defendant moved to set aside the judgment by default, and for leave to answer, upon the ground that no notice had been served on him of the filing of the amended petition.

This motion was heard by the court and overruled, but the bill of exceptions does not show what evidence was given upon the trial of the motion. Nor was there any affidavit of a meritorious defence filed with the motion.

This court must presume everything, in support of the judgment below, which can be fairly inferred from the record. As the evidence upon which the motion was decided is not preserved, we must infer that there was due proof of notice of filing the amended petition. Besides, a judgment by default regularly rendered will not be set aside unless there be due dilidence shown, and also an affidavit of a good and meritorious defence filed. This seems to be the settled law in this State.

The judgment must be affirmed. Judge Wagner concurs. Judge Bliss absent.

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JOHN H. SANDERS *et al.*, Appellant, *vs* JOHN. V. OHLHAUSEN, interpleader, Respondent.

1. *Landlord and tenant.—Lien of landlord for crop.—Attachment of by creditor of tenant—Interplea, construction of statute*—A tenant, abandoned the leased premises, making default in payment of his rent and leaving behind him an unharvested crop. Before the expiration of the lien theron authorized by statute, (Wag. Stat. 880, § 18), after the landlord had harvested the crop, the same was seized under an attachment levied by a creditor of the tenant. Held, that the landlord had such a right of property in the crop as would enable him, under the general attachment law (Wag. Stat. 192, § 52,) to claim it by interplea.

Appeal from Cape Girardeau Court of Common Pleas.

L. Brown, for Appellant.

I. The landlord can enforce such lien only by a strict compliance with the statutory method for such actions. (2 Wag., 881, §§ 26, 27; Schell *vs.* Leland, 45 Mo., 294).

II. The language in section 26, last cited—is "the person to whom the rent is owing MAY before a Justice of the Peace" obtain an attachment—this word *may* is to be read *shall*; (Steines vs. Franklin Co., 48 Mo., 178,) hence the remedy by attachment under the Statute is peremptory and exclusive of all others.

L. Houck, for Respondent.

I. A fair and reasonable construction of section 52, Gen. Stat. 1865, 569, (1 Wag. Stat. 192), would authorize any person claiming a special or general property to interplead.

II. The attachment provided by the landlord and tenant act, (see Gen. Stat. 1865, 741, § 26; 2 Wag. Stat. 881,) does not require an attachment to be issued in a case where the crop is already in possession of the landlord, because the affidavit provided for in that section, must show that the landlord "will lose his rent."

III. How could Ohlhausen make such an affidavit? Besides this section is not mandatory, it is a mere cumulative remedy

WAGNER, Judge, delivered the opinion of the Court.

The only question important to be considered in this case is whether the interplea of the respondent was maintainable. The respondent owned certain land which he rented for one year and the tenant sowed the land in grain. After this, and before harvest, the tenant left the premises, and the respondent advanced money to pay for the harvesting and took possession of the grain. The tenant never returned.

Appellant had a debt against the tenant and attached a part of the grain, then in the respondent's possession. Respondent appeared and filed his interplea and claimed that he was entitled to the grain by virtue of his landlord's lien. Judgment was rendered in his favor.

It is insisted that the statute, (1 Wag. Stat., 192, § 52) authorizing the assertion of a claim by interplea in attachment suits, only applies when a person claims the identical property in kind, and that the respondent's case does not come within that classification, and that his only remedy was to proceed under the 26th and 27th sections of the Landlord and Tenant act. (2 Wag. Stat., 881, 882.)

The 18th section of the act regarding landlords and tenants, gives the landlord a lien upon the crop grown on the premises in any one year, and continues the same for eight months after the rent becomes due and payable. The 26th and 27th

sections provide for the manner of enforcing the lien, but is the manner therein pointed out exclusive?

If the crop was in the possession of the tenant or his assignee, then clearly the landlord could not enforce his lien, or acquire any right to the property except by resorting to legal process. (Knox vs. Hunt, 18 Mo., 243.)

But the crop during the existence of the lien is not subject to the process of the law without payment of the rent, at the suit of another creditor, as the lien of the landlord protects it from sale. Nothing can be seized under execution which cannot be sold. (Cross on Liens, 48; Knox vs. Hunt, *supra.*)

As the landlord had the property in possession with a special lien thereon, which protected it from seizure and sale till the lien was paid off, I think he had such a right of property as enabled him to claim it by interpleader.

Judgment affirmed. The other judges concur.

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WILLIAM DRUHE, Plaintiff in Error, *vs.* MARIE J. B. DELASSUS AND AUGUST DEHAULT DELASSUS, Defendant in Error.

1. *Married women—Estates of—Debts created by trustees, do not encumber.*—The law is well settled that a married woman holding separate property, may create debts in reference thereunto and so bind it in equity for their payment. But the simple fact, for example, that her trustee creates debts for improvements ordered by him on her property, does not of itself create a lien on the property without any deed or other appropriate instrument of writing executed by him.

Error to St. Francois Circuit Court.

Bakewell & Farish, for Plaintiff in Error, cited, North American Coal Co. vs. Dyett, 7 Paige, 9; Dickermann vs. Abrahams, 21 Barb. 551; 2 Story Equity Jurisp., §§ 1397–1401; Jacques vs. The Methodist Church, 17 John., 548; White vs. McNett, 33 N. Y., 371; Williard's Equity Jurisprudence, p. 646; Kimm vs. Weippert, *et al.*, 46 Mo., 544.

J. F. Bush, for Defendant in Error.

The petition fails to state a cause of action or to show any

grounds for charging the separate estate of Marie Jeane Blanque DeLassus. The petition contains no averment of any intent on the part of said co-defendant to charge her estate with said amount or indebtedness. The intention is always an essential element in the creation of such a charge. (Kimm vs. Weippert, 46 Mo., 532.)

Adams, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill in equity to charge the separate property of the defendant, Marie J. B. DeLassus, with the payment for materials furnished her husband, who was her trustee, in improving her property.

The record shows that in 1864 the defendant, Augustus DeHault DeLassus, as trustee of his wife, Marie J. B. DeLassus, acquired a large amount of real estate in St. Francois and other counties, "to have and to hold the same in trust for the sole profit and in behoof of the said Marie J. B. DeLassus, with power to collect the rents, issues and profits, and to invest the same, and to sell, convey or encumber by deed of trust, mortgage or otherwise, and any conveyance executed by him shall affect, bind, convey and dispose of said property."

The said defendant, Augustus DeHault DeLassus, for himself, and as trustee of his wife, Marie J. B. DeLassus, on the 23d of October, 1868, laid out a town on this property, called "DeLassus," and recorded a plat thereof. On this plat is a part of a square, marked "Hotel," fronting 300 feet on Main street, by a depth of 153 feet.

For the purpose of erecting said hotel, plaintiff, at the instance and request of the defendant, Augustus DeHault DeLassus, furnished lumber and materials. The only evidence on this point is the plaintiff's own deposition. In that deposition he says: "I furnished the material mentioned in the petition; the prices therein stated are reasonable and fair, and a great many of them are very low; the articles were furnished on the credit of the property; I looked to the property as the security for the payment of those articles; they were ordered by Mr. DeLassus; those articles were used in the erection of a building intended for a hotel."

The property sought to be charged is said hotel and the ground covered thereby, 42 feet, by depth along DeLassus street of 150 feet.

The foregoing is substantially all the evidence that was before the Circuit Court, and upon this evidence the court found for the defendants and gave judgment accordingly.

The plaintiff filed a motion for a new trial, which was overruled, and he has brought this case here by writ of error.

The law is well settled that a married woman holding separate property may create debts in reference to such property, and thereby bind it in equity for their payment. The difficulty in this case is that there is not a particle of proof that Mrs. DeLassus created the debts in question, or authorized her husband to do so in her name. The lumber was ordered by him, and it may be that he acted as trustee, intending to secure the debt by mortgage on the property; but the simple fact of his ordering the lumber, or creating the debt as her trustee, did not thereby create a lien on her property. As trustee, the husband, under the deed of trust, had the power to encumber the property, but he could not do so simply by creating a debt. He could only encumber it by deed, or some appropriate instrument of writing executed by him for that purpose. The plaintiff might have required this before parting with his lumber. He testifies that he looked to the property for security. How could he look to it simply by furnishing lumber to the trustee, without any instrument of writing from him creating a charge upon the property? The plaintiff, after furnishing the lumber, might have protected himself by filing a lien under the mechanic's lien law. As the case stands before us, we can give him no relief. We see no other course than to affirm the judgment.

Judgment affirmed. Judge Wagner concurs. Judge Bliss absent.

JOHN MAMMON, Plaintiff in Error, *vs.* JOHANNA HARTMAN, *et al.*, Defendant in Error.

1. *Bills and Notes—Signature on back of note—Effect of parol evidence as to.* —When one writes his name on the back of a note of which he is neither payee nor indorsee, in the absence of extrinsic evidence, he is to be treated as the maker thereof. But parol evidence is admissible to show that he did not sign as maker but as endorser. (Kuntz vs. Temple, 48 Mo., 71.)

Error to Ste. Genevieve Circuit Court.

J. B. Robbins and J. F. Bush, for Plaintiff in Error.

I. The evidence shows the signing of the promissory note by the defendant Johanna Hartman before the delivery thereof to the plaintiff. From the circumstance of the signing of the note by the defendant before delivery to plaintiff, the law fixes the relations of the parties to the instrument and to each other, and presumes that the defendant was a maker or co-maker. (Powell vs. Thomas, 7 Mo., 440; Lewis vs. Harvey *et al.*, 18 Mo., 74; Perry vs. Barret, *Id.*, 140; Schneider vs. Schiffman, 20 Mo., 571; Baker vs. Block, 30 Mo., 225; Western Boatmen's Benevolent Association vs. Wolff, 45 Mo., 104; Schmidt vs. Schmælter, *Id.*, 502; Kuntz vs. Tempel, 48 Mo., 71.)

II. In the absence of an express agreement, giving defendant a different relation to the instrument, this presumption that defendant was maker must prevail and entitle plaintiff to judgment in this action.

Robinson & Clardy with C. C. Rozier, for Defendant in Error.

I. Although there is a presumption that a party who endorses his name upon a promissory note of which he is neither the endorsee or payee, is the maker thereof, yet it is competent for him to show by parol evidence, that he did not in fact sign as maker but as endorser or guarantor. (Powell vs. Thomas 7 Mo., 440; Lewis vs. Harvey, 18 Mo., 74; Perry vs. Barret, 18 Mo., 140; Baker vs. Block, 30 Mo., 225; Beidman vs. Gray, 35 Mo., 282.)

II. In what character the defendant put her name on the back of the note, was a question of fact within the exclusive province of the trial court to determine. Western Boatmen's Benevolent Association vs. Wolff, 45 Mo., 104; Kuntz vs. Tempel, 47 Mo., 71.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff sued the defendant and one Meyer, as joint makers of a negotiable promissory note.

The defence was, that defendant signed her name on the back of the note as an endorser, and that plaintiff failed to present the note at its maturity for payment, or to give her any notice of its non-payment, by reason of which she was discharged.

The only issue made in the case was whether the defendant signed the note as an original maker or as indorser. The trial was before the court, both parties waiving a jury, and after hearing evidence the court found for the defendant.

We see no error in the courts refusing the plaintiff's instruction that the evidence showed no defence in the cause. There was abundance of evidence from which a contrary conclusion might be deduced.

The court then declared the law to be that if the evidence showed that Mrs. Hartman, the defendant, signed the note as an indorser and not as a maker, the verdict should be for the defendant.

The other instructions given and refused were immaterial, as the above declaration covered the whole issue in the case.

When a party writes his name on the back of a note of which he is neither payee nor indorsee, in the absence of extrinsic evidence, he is to be treated as the maker thereof. But parol evidence is admissible to show that he did not sign as maker but as indorser. (Lewis vs. Harvey, 18 Mo., 74; West ern Boatmen's Benevolent Association vs. Wolff, 45 Mo.,104; Kuntz vs. Tempel, 48 Mo., 71.)

The case was submitted to the court under a correct view of the law and its finding is conclusive here.

Let the judgment be affirmed. Judge Adams concurs. Judge Bliss absent.

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HARDY V. HARRISON, Respondent, *vs.* GEORGE T. BARTLETT, Appellant.

1. *Practice, civil, Supreme Court—Appeal—General exceptions, effect of.*—A general statement at the end of a bill of exceptions, that to all the rulings, orders and judgments of the court the defendant excepted, is insufficient and will not be noticed by the Supreme Court. The exception must be saved to the specific ruling in the progress of the cause.

Appeal from Butler Circuit Court.

E. McGinnis, for Appellant.

T. T. Gantt, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case was tried before the court sitting as a jury, and afte hearing the evidence the verdict was for the plaintiff, and judgment was rendered thereon. From that judgment the defendant has appealed.

We have examined the whole record and find that no exceptions were saved to the rulings of the court, and no instructions were asked for or given. There is, therefore, no point of law preserved for this court to review.

At the end of the bill of exceptions we find it stated that to all the rulings, orders and judgment of the court the defendant excepted. But this court has always held that that was not sufficient and would not be noticed.

The exception must be saved to the specific ruling in the progress of the cause. When a question of law is sought to be raised on the trial, instructions should always be asked for so as to enable this court to see on what theory the court below decided.

As there is no question of law before us, the judgment must be affirmed. Judge Adams concurs, Judge Bliss absent.

JOHN WITTMOR to use, etc., Defendant in Error, *vs.* EDWIN HASTINGS, *et al.*, Plaintiff in Error.

I. *Assignment for benefit of creditors—Execution will not lie in behalf of one creditor, when.*—A merchant being indebted to certain judgment creditors, and being in failing circumstances, turned over his merchandise to an agent to be sold, and the proceeds to be distributed *pro rata* among his creditors. Held, that if the proceedings were in good faith, the goods would not be subject to execution on behalf of one creditor to satisfy his own individual claim.

Error to Cape Girardeau Court of Common Pleas.

From the statement of defendant in Error, it appears that Houck did not claim to represent Hastings, Britton & Co., and that they took no part in the matter of the assignment, and were not represented in it, except that Houck agreed with Whitelaw, Garrett & Co., to see to it that H., B. & Co. should receive their *pro rata* share of the proceeds.

Peacock & Colby, for Plaintiff in Error.

Houck allowed Garrett to transfer the goods under the supposition that he would act for Hastings, Britton & Co., and he so accepted the goods, leaving such impression existing. If such be the fact, his attempted confinement of the proceeds to the debts that he represented, was a fraud on Hastings, Britton & Co., and Whitelaw & Garret.

L. Houck, for Defendant in Error.

I. It may be argued, that the delivery was to Houck as trustee. That proposition, however, cannot be maintained as a fact, because positively disproved by the evidence. Nor could Houck be considered a trustee in contemplation of law. An assignment in trust is distinguishable from an absolute sale in this: that in a sale the vendor parts with all his interest, but in an assignment the assignor retains a contingent resulting interest. (Burrell on Assign. 29 *et seq.*)

In this case Whitelaw & Garrett absolutely delivered the goods as a part payment, without any qualifications, to Houck as the agent and attorney of the parties for whose use this

suit was brought, and the goods were received in part payment of their judgments *pro rata*. The case of Keiler vs. Tutt, 31 Mo. 301, it would seem virtually settles this case.

II. But was the sale fraudulent as to Hastings, Britton & Co.? It is shown that Mr. Houck agreed that he would see that Hastings, Britton & Co., should also receive their *pro. rata* share. Does this show fraud? Does it not, on the contrary show that no attempt was made to over-reach this firm? The action in the premises of the representative of the parties for whose use this suit is brought, is respectfully submitted to this Court.

III. The sole purpose of all parties was to prevent the cost of issuing, levying, etc., eighteen executions. The stock of goods was small, and it is evident that the costs of so many executions would have eaten up a good portion of the proceeds and for that reason the goods were received in payment, just, as a sum of money would have been received in payment.

IV. The fact that Mr. Houck agreed to see to it that Hastings, Britton & Co. should receive their share of the proceeds of the goods is not denied, and if he had failed to pay them their *pro rata* amount, they certainly would have had an action.

V. But the learned attorney of Hastings, Britton & Co., although he disclaimed being attorney when interrogated by Mr. Garrett, and asked by Mr. Houck, and informed of the fact that some goods could be secured; as soon as the goods were delivered, he at once remembers that he is still attorney, and has an executon issued and levied, and in his own words, although after the levy, the proposition to allow Hastings, Britton & Co. pro rata was renewed, finally refused to assent.

VI. The *bona fides* of the whole transaction was passed upon by the jury.

Wagner, Judge, delivered the Opinion of the Court.

We think there is no good objection to the action of the court in receiving the affidavits to prove the fact of partnership of the two firms. The criticism on their phraseology is altogether too refined; their meaning was sufficiently plain

and certain, and they abundantly answered the object for which they were introduced.

Upon the merits, the case was rightly decided.

The record shows that Whitelaw & Garrett were indebted to several parties who had judgments against them, and that they were unable to pay their debts; that Houck, an attorney at law, represented all the creditors except Hastings, Britton & Co.

Whitelaw & Garrett were anxious to save costs, and to prevent a sacrifice of the small amount of goods they possessed, and they proposed to turn over to their creditors the goods they had on hand, and they were to be sold out and the proceeds divided *pro rata*.

Houck, who was the agent and intrusted with the sale of the goods, agreed also to give to Hastings, Britton & Co., their proportionate share. After the goods had been transferred and some of them sold, the attorney for Hastings, Britton & Co., caused an execution to be levied upon the remainder, and had them sold in satisfaction of their debt. The creditors to whom they were transferred and delivered claimed the goods from the officer who had them in his custody and to indemnify him Hastings, Britton & Co., gave a bond in accordance with the statute, and that bond is the foundation of this suit.

For the plaintiffs, the court instructed the jury that if they were satisfied from the evidence that Whitelaw & Garrett turned over in good faith the goods in question, to be a partial payment on the judgments of the parties for whose use the suit is brought, and that the goods were so received in good faith as a partial payment, then the goods were not subject to the execution of the defendants, and the verdict should be for the plaintiffs.

For the defendants the court declared the law to be, that before the jury could find for the plaintiffs, they must find from the evidence that the goods were transferred to the plaintiffs in payment *pro rata* of their claims without any condition whatever.

The question of the *bona fides* of the transactions was put to the jury, under instructions sufficiently favorable to the defendants.

The facts show that the property was taken possession of, that an invoice was made out, and an adequate consideration given.

Let the judgment be affirmed. The other judges concur.

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STATE OF MISSOURI, Plaintiff in Error, *vs.* HERMAN KOERNER, Defendant in Error.

1. *Practice, criminal.—Motion in arrest, etc.—No plea entered.*—Where the accused in a criminal trial puts in no plea, and the plea of not guilty is not entered in his behalf, it is error, for which motion in arrest will lie. But in granting the motion in arrest, the court has no right to enter a judgment discharging the prisoner. The proper course in the premises would be to set aside the judgment and order a new trial on the indictment.

Error to Jefferson Circuit Court.

G. D. Reynolds, for Plaintiff in Error.

H. F. Alvers, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the Court.

This was an indictment for selling liquor as a dramshop keeper without license. The defendant was tried before a jury and a verdict of guilty found.

He put in no plea and none was entered for him.

A motion in arrest of judgment was filed and entertained and an order discharging the prisoner entered.

The motion in arrest was properly sustained. The statute requires the Court to enter a plea of not guilty when the defendant fails to do so. The trial without entering the plea, was error for which the verdict ought to have been set aside, and a new trial granted. (Maeder vs. The State, 11 Mo., 363; The State vs. Andrews, 27 Mo., 267.)

On sustaining the motion in arrest of judgment the court had no right in this sort of case to enter a judgment discharg-

ing the prisoner. When an indictment is good and a motion in arrest is sustained because the verdict is wrong, the proper judgment is to arrest the judgment on the verdict and set it aside and order another trial on the indictment.

The judgment is reversed and the case remanded to be proceeded in as herein directed. Judge Wagner concurs. Judge Bliss absent.

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ALEX. B. SNYDER, Exe. of OLIVER E. SNYDER, Defendant in Error, *vs.* LINDSAY MURDOCK, Plaintiff in Error.

1. *Lands and land title—Title bond—Notes for purchase money—Property at whose risk, etc.*—After an executory contract for the conveyance of real estate has been entered into, by the execution of a bond for title and notes for the purchase money, the property is at the risk of the purchaser.
2. *Land, sale of—Purchase notes—Title bonds—Pleading—Counter claim.*—Where notes are given for the purchase money of land, and the vendor delivers to the maker of the notes his bond for the title, the right of the vendor to sue on the notes does not depend on his tender of the deed, and in bringing suit he is not bound to refer to the title bond. The transactions are separate and distinct, and the defense that plaintiff had failed to make tender of the deed is matter for an independent counter claim.

Error to St. Francois Circuit Court.

B. B. Cahoon and J. B. Robinson, with John F. Bush, for Plaintiff in Error.

I. The covenants, in the bond for a deed, of defendant in error's testator, and the execution of the notes by plaintiff in error for the payment of the purchase money, were, unquestionably, mutual and dependent contracts and covenants. This being true, it was incumbent upon the defendant in error, or the heirs of the testator, to tender a deed, conveying by good title all the property described in the bond for a deed, and to aver such tender in his petition, as a condition precedent to the right of recovery on the notes; and the vendor, or his representatives, can not recover, without averring performance, or an offer to perform. (Biddle vs. Coryell, 3 Harrison, 377; Leonard vs. Bates, 1 Blackf. 172; Bank

of Columbia vs. Hagner, 1 Peters, 455 to 465; Dietrich vs. Franz, 47 Mo., 85, and cases there cited; Wellman's Adm'r. vs. Dismukes, 42 Mo., 101; Washington and Turner vs. Ogden, 1 Black, 450; Huffman vs. Ackley, 34 Mo., 277; see specially Robinson vs. Harbour, 42 Miss., 797, and Vol. 9, Am. Law, Reg. 357,—to be found also in 2 American Reports, 671.)

The doctrine of mutual and dependent covenants savors so strongly of justice, that courts will construe covenants to be mutual and dependent, unless the contrary intention clearly appears in the contract; and this doctrine is founded upon the equitable doctrine that a party shall not be forced to pay out his money, unless he can get that for which he stipulated. (Stockton vs. George, 7 How., 172; Peques vs. Mosby, 7 S. & M. 340; Waddington vs. Hill, 10 S. & M., 560; Bank of Columbia vs. Hagner, 1 Peters, 455; 2 Wendell, 297; Robinson vs. Harbour, 42 Miss. 797 cited *supra.*)

Green, Gilroy & McClardy, for Defendant in Error

The tender of the deed for the property in this case, is not a condition precedent to the maintainance of the action, but only a condition precedent to obtaining a judgment for the purchase money; such being the case, a tender of a good and sufficient deed by replication, as in this case, is sufficient. (Luckett vs. Williamson, 37 Mo., 388; Wellman's Adm'r. vs. Dismukes, 42 Mo., 101.)

Adams, Judge, delivered the opinion of the court.

This was an action on two promissory notes, executed to the plaintiff's testator.

The defendant set up several distinct defenses in his answer.

1st. That the notes were given for land and fixtures for which plaintiff's testator had given his bond for title, and had failed to convey.

2d. That neither the testator or any other person, had offered to convey the real estate to him.

3rd. That the contract had been rescinded.

4th. That after such rescission, the fixtures, consisting of a carding machine and mill, had been consumed by fire, and that they gave value to the land, and were the main inducement to the purchase.

The plaintiff by replication admitted that the notes were given for the real estate mentioned, but alleged that his testator had always been ready to comply with his bond on the payment of the purchase money, and that he was now ready and willing, and on the trial tendered a deed from the devisees to defendant. The replication denied the rescission of the contract, &c.

The case was submitted to the court sitting as a jury, and resulted in a verdict and judgment for the plaintiff.

There was no evidence of any rescission of the contract, except the testimony of the defendant, which was objected to, on the ground that the testator and his agent who made the contract were both dead. But the court allowed him to testify.

The defendant contends that by the pleadings, this case was converted into a suit in equity.

The suit is upon promissory notes and the defenses set up are all legal defences such as could have been pleaded at law under the old system of pleading.

The instructions given on both sides presented the law of the case fairly. The court was the judge of the credibility of the witnesses, and the sufficiency of the evidence, and we do not feel at liberty to disturb the finding.

After an executory contract for the conveyance of real estate has been entered into, by the execution of a bond for title and notes for the purchase money, the property is at the risk of the purchaser.

If it burns up it is his loss, if it increases in value it is his gain. This is the settled equity doctrine, and is based upon the principle that in equity what is agreed to be done must be considered as done.

The plaintiff's right to sue on these notes did not depend on a tender of a deed. The notes were unconditional on their

face, and in bringing suit he was not bound to refer to the title bond.

The defence in regard to the title bond, was an independent counter-claim, and the plaintiff had the right to reply as he did and make tender of the deed on the trial. A vendor ordinarily is not bound to part with his title, till all the purchase money is paid. He can retain the title as security for the purchase money, unless he has bound himself to make the title before payment.

Judgment affirmed. Judge Wagner concurs. Judge Bliss absent.

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HARDY BROOKS, Defendant in Error, *vs.* PASCHAL E. ANCELL, *et al.*, Plaintiff in Error.

1. *Practice, civil—Pleading—Different counts—Suit on contract containing more than one stipulation—Variance, etc.*—In suit on a note wherein defendant promised to pay a certain sum (together with costs and attorney's fees,) it was held no variance that the first count omitted, and the second count set forth the stipulation as to payment of costs, etc. In such case the second count might be treated as a continuation of the first, or as part of it and both might be considered as one count.
2. *Contract, stipulations in—Failure to sue upon all—Effect of.*—A party need not sue upon all the stipulations of a contract. But if he sues upon one and neglects to sue upon the other stipulations contained in the same contract, judgment in the first suit might be a bar to an action on the omitted stipulations.

Error to Cape Girardeau Court of Common Pleas.

George H. Greene, for Plaintiff in Error.

Dennis Wilson, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action founded on the following instrument of writing to-wit: "One year after date we promise to pay to Hardy Brooks five hundred dollars, (and all costs and lawyers' fees necessarily incurred in the collection of the same) for value received, negotiable and payable without defalcation or dis-

count, and with interest on said sum of five hundred dollars from date, at the rate of ten per cent. per annum.

John D. Ancell.
Paschall E. Ancell.
George H. Watson.

In the first count of the petition, this instrument was set forth with the exception of the stipulation in brackets in regard to payment of costs, and judgment was demanded for the five hundred dollars with interest. In a second count of the same petition, the stipulation about payment of costs is set forth and a breach alleged and judgment claimed for amount of costs paid under this stipulation. There was also a third count in the petition which it is unnecessary to recite, as both the second and third counts were dismissed.

When the instrument was offered in evidence, the defendant objected on the ground of variance; but the court overruled the objection and gave judgment for the five hundred dollars and interest.

This question of variance is the only point presented for our consideration. There seems to be no variance at all unless it be in omitting to sue upon one of the stipulations of a contract. A party need not sue upon all of the stipulations of a contract. If he sues upon one and neglects to sue upon others contained in the same contract, a question might arise whether a judgment in the first suit, would not be a bar to an action on the omitted stipulations.

That question, however, is not before us now, and need not be passed on here. In this case, the second count asking judgment on the stipulation in regard to costs, may be looked upon as only a continuation of the first count, or as part of it, and both counts together may be treated as one count, and as describing the instrument in all particulars. And the dismissal as to the count must be treated as waiving any right to a judgment on that stipulation. Under this view there seems to be no error in the record.

Judgment affirmed. The other judges concur.

END OF OCTOBER TERM, ST. LOUIS 1872.